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THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED RULES

May 2005 Supplement to the 2005 Edition

Prepared Under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
The Editorial Staff of the Publisher

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4648922

ISBN 0-820-59229-3

Matthew Bender & Company, Inc.

P.O. Box 7587, Charlottesville, VA 22906-7587

www.lexisnexis.com

(Pub.46405)

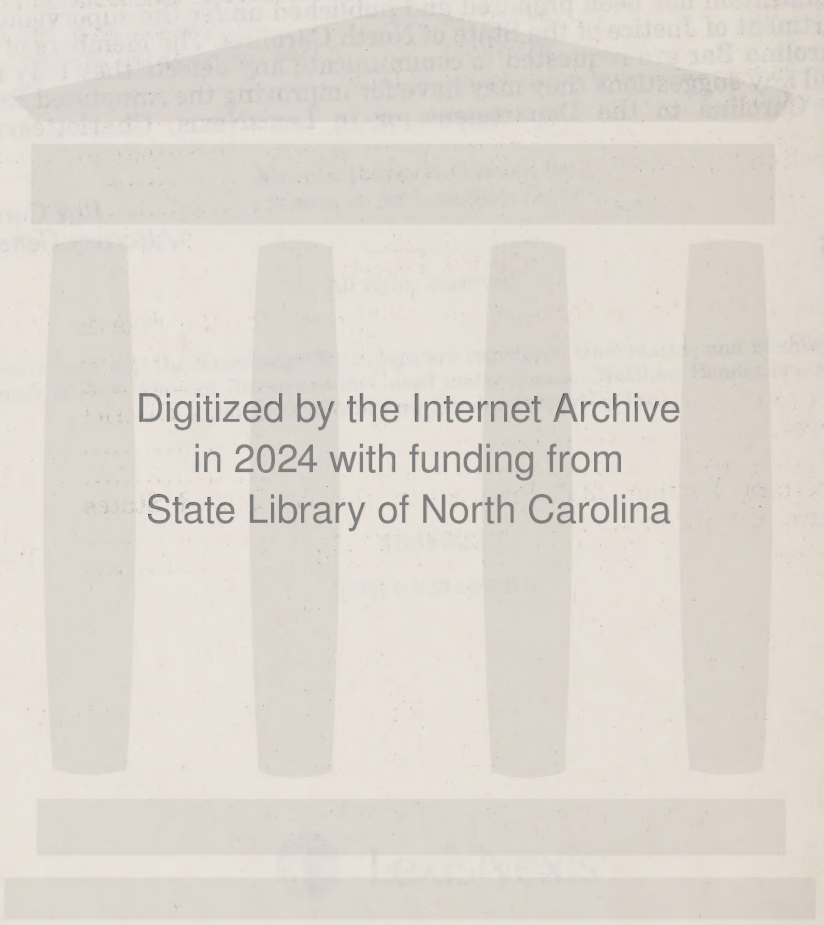
Preface

This May 2005 Supplement to the 2005 Edition of the Annotated Rules of North Carolina contains amendments to the rules of the courts of North Carolina and those federal rules set out in the 2005 Edition effected by orders promulgated since the publication of the 2005 Edition through April 15, 2005. It also contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of appropriate federal courts posted on LEXIS through March 15, 2005.

This publication has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find herein and any suggestions they may have for improving the Annotated Rules of North Carolina to the Department, or to LexisNexis, Charlottesville, Virginia.

ROY COOPER
Attorney General

May 2005



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GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule 2.1. Designation of exceptional civil cases and complex business cases.

CASE NOTES

Cited in Long v. Hammond, 164 N.C. App. 486, 596 S.E.2d 839, 2004 N.C. App. LEXIS 1040 (2004).

Rule 3. Continuances.

CASE NOTES

Denial of Continuance Motion Affirmed. — Trial court did not abuse its discretion in denying a county's motion for a continuance, the basis for which was its counsel's attendance of a mandatory training session in order to file documents in other court cases. Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334, 2004 N.C. App. LEXIS 975 (2004).

Rule 21. Jury instruction conference.

CASE NOTES

Failure to Request Special Instructions in Writing. — Trial court properly refused to give defendant's requested special instruction on the defense of justification of possession of a firearm by a felon because the request was not in writing. State v. Craig, — N.C. App. —, 606 S.E.2d 387, 2005 N.C. App. LEXIS 6 (2005).

Rule 24. Pretrial conference in capital cases.

CASE NOTES

Cited in State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

Rule 25. Motions for appropriate relief and habeas corpus applications in capital cases.

CASE NOTES

Ineffective Assistance of Counsel: Duty to Investigate. — Applying the Wiggins test, North Carolina Supreme Court found that counsel for a death-sentenced defendant was not shown to be ineffective because counsel (1) was not under a mandate to second-guess two mental health experts that opined that certain tests were not necessary to determine whether the defendant had brain damage that would have indicated a murder was not intentional or indicated a mitigator, (2) had interviewed other persons regarding the defendant's behavior patterns to assist in formulating his own opinion, and (3) took into consideration that that particular brain injury defense was not proven to be effective based on the result of the first trial in which the defendant also received a death sentence; the highest court concluded that the counsel did not prematurely abandon a defense based on organic brain damage and that their election to pursue a defense/mitigation strategy predicated on other grounds constituted a reasonable professional judgment. State v. Frogge, — N.C. —, — S.E.2d —, 2005 N.C. LEXIS 29 (Feb. 4, 2005).

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

Adopted August 28, 1986.
Effective January 1, 1987,
with amendments received effective through January 1, 2005.

Rule
2. Arbitrators.

Rule 2. Arbitrators.

(a) *Selection.*

(1) The Court shall approve and maintain a list of qualified arbitrators, which shall be a public record. The parties may stipulate to an arbitrator on the Court's list within the first 20 days after the 60-day period fixed in Arb. Rule 8(b). If there is no stipulation, the Court shall appoint an arbitrator from the list and notify the parties of the arbitrator selected.

(2) Parties may choose an arbitrator who is not on the Court's list provided the arbitrator consents, the Court approves the choice, and the arbitrator otherwise meets all the requirements of Arb. Rule 2 with the exception of the requirement to complete the arbitrator training as prescribed by the Administrative Office of the Courts. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the court order approving such stipulation shall be filed within the same 20-day period for choosing an arbitrator on the Court's list.

(b) *Eligibility.* An arbitrator shall be a member in good standing of the North Carolina State Bar and have been licensed to practice law for five years. The arbitrator shall have been admitted in North Carolina for at least the last two years of the five-year period. Admission outside North Carolina may be considered for the balance of the five-year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia. In addition, an arbitrator shall complete the arbitrator training course prescribed by the Administrative Office of the Courts and be approved by the Chief District Court Judge for such service. Arbitrators so approved shall serve at the pleasure of the appointing Court.

(c) *Fees and expenses.* Arbitrators shall be paid a $100 fee by the Court for each arbitration hearing when they file their awards with the Court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $100 for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the Chief Judge of the District Court.

(d) *Oath of office.* Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) *Arbitrator ethics; Disqualification.* Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

(f) *Replacement of arbitrator.* If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed by the Court from the list of arbitrators.

Administrative History.
Amended: 1 January 2005 — (c)

Rule 5. Trial de novo.

CASE NOTES

Dismissal for failure to appear proper. — In the context of N.C. R. Arb. 5 demand for a trial de novo, a trial de novo is not an "appeal," in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award; a trial court properly dismissed a county's appeal from a small claims court judgment where the county failed to appear for the scheduled trial de novo. Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334, 2004 N.C. App. LEXIS 975 (2004).

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ARTICLE I. APPLICABILITY OF RULES

Rule 1. Scope of rules: Trial tribunal defined.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in In re D.Q.W., — N.C. App. —, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004).

Rule 2. Suspension of rules.

CASE NOTES

Discretion of Appellate Court. —

Although the record that defendants presented to the appellate court did not contain an instruction that defendants requested and the trial court refused to give, or the charge that the trial court gave to the jury, the appellate court elected, pursuant to N.C. R. App. P. 2, to consider defendants' claim that the trial court erred when it instructed the jury. However, the appellate court rejected defendants' claims that the trial court erred when it gave the jury an instruction on sudden emergency arising from a motor vehicle accident, or when it decided to instruct the jury on reasonable and prudent speed instead of instructing the jury that plaintiff had a duty to decrease his speed to avoid a collision. Campbell v. McIlwain, 163 N.C. App. 553, 593 S.E.2d 799, 2004 N.C. App. LEXIS 399 (2004).

Although mother involved in the abuse and neglect case did not object to having the county social services department consolidating the adjudication and disposition hearings, and, thus, waived that issue for the purpose of review, the appellate court was entitled to exercise its authority, pursuant to N.C. R. App. P. 2, to disregard that waiver and address the merits of that argument. In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004).

By failing to address the interlocutory nature of an order in a brief to the appellate court, the appellants (siblings who were not allowed to intervene in a G.S. 49-14 paternity action) violated N.C. R. App. P. 28(b)(4); however, pursuant to N.C. R. App. P. 2, the appellate court elected, in its discretion, to hear the merits of the appellants' argument. Stockton v. Estate of Thompson, — N.C. App. —, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

The court could not suspend the rules, etc. —

Mother's Notice of Appeal, filed 42 days after the trial court's order granting her motion for additional findings, was untimely as to that order, and the appellate court was therefore without jurisdiction to address the mother's challenge of that order; without proper notice of appeal, the appellate court acquired no jurisdiction and neither the court nor the parties were allowed to waive the jurisdictional requirements even for good cause shown under N.C. R. App. P. 2. Sillery v. Sillery, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 167 (Jan. 18, 2005).

Although the issue of a trial court's failure to appoint a guardian ad litem for a father in an action to terminate parental rights was not raised by the father in his appeal of the termination order, as was required by N.C. R. App. P. 10(a), the appellate court suspended the requirements of Rule 10(a) and sua sponte considered the issue pursuant to N.C. R. App. P. 2 in order to prevent manifest injustice to the father. In re S.B., — N.C. App. —, 602 S.E.2d 691, 2004 N.C. App. LEXIS 1776 (2004).

Appellants' appeal was dismissed where they committed numerous egregious violations of the North Carolina Rules of Appellate Procedure by the late filing of their brief and by their brief's failure to comply with N.C. R. App. P. 28, there were no exceptional circumstances, significant issues, or manifest injustices that would have been corrected by appellate review, so that there was no reason to waive their numerous violations. Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Applied in State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004); In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004); State v. Brice, — N.C. App. —, 604 S.E.2d 356, 2004 N.C. App. LEXIS 2054 (2004); State v. Canellas, 164 N.C. App. 775, 596 S.E.2d 889, 2004 N.C. App. LEXIS 1136 (2004); State v. Thaggard, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 250 (Feb. 1, 2005); State v. Snipes, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 334 (Feb. 15, 2005); Howie v. Walsh, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 393 (Mar. 1, 2005).

Cited in Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004); State v. Moore, — N.C. App. —, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004); In re D.S.C., Minor Child, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 172 (Jan. 18, 2005).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3. Appeal in civil cases — How and when taken.

CASE NOTES

I. In General.

I. IN GENERAL.

This rule is jurisdictional, etc. —

Mother's Notice of Appeal, filed 42 days after the trial court's order granting her motion for additional findings, was untimely as to that order, and the appellate court was therefore without jurisdiction to address the mother's challenge of that order. Sillery v. Sillery, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 167 (Jan. 18, 2005).

When Time Begins to Run. —

Assault victims' appeal of dismissal of their negligence cause of action against a county education board was dismissed as untimely because the victims appealed the dismissal of their claim and then voluntarily dismissed their other claims while that appeal was ongoing; therefore, when the appellate court dismissed the victims' first appeal as an interlocutory appeal, the victims failed to timely appeal that claim on their second appeal because the voluntary dismissal of their remaining claims had the effect of making the trial court's grant of partial summary judgment a final order. Stein v. Asheville City Bd. of Educ., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 263 (Feb. 1, 2005).

Failure to Give Notice of Appeal. —

Appellate court refused to consider a condominium association's claim that the trial court erred when it taxed the association with the costs of an action it filed against a subcontractor, seeking recovery of costs it incurred to repair two buildings that were damaged during a rainstorm, because the association failed to file a notice of appeal from the trial court's order taxing costs to the association. Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 594 S.E.2d 227, 2004 N.C. App. LEXIS 570 (2004).

Applied in In re Hudson, — N.C. App. —, 600 S.E.2d 25, 2004 N.C. App. LEXIS 1506 (2004), appeal dismissed, cert. denied, 359 N.C. 189, — S.E.2d — (2004); Krantz v. Owens, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 264 (Feb. 1, 2005).

Cited in Advanced Wall Sys. v. Highlande Builders, LLC, — N.C. App. —, 605 S.E.2d 728, 2004 N.C. App. LEXIS 2320 (2004).

Rule 9. The record on appeal.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.
E. Evidence.

I. IN GENERAL.

Omission of Jury Instructions. —

Although the record that defendants presented to the appellate court did not contain an instruction that defendants requested and the trial court refused to give, or the charge that the trial court gave to the jury, the appellate

court elected, pursuant to N.C. R. App. P. 2, to consider defendants' claim that the trial court erred when it instructed the jury. However, the appellate court rejected defendants' claims that the trial court erred when it gave the jury an instruction on sudden emergency arising from a motor vehicle accident, or when it decided to instruct the jury on reasonable and prudent speed instead of instructing the jury that plaintiff had a duty to decrease his speed to avoid a collision. Campbell v. McIlwain, 163 N.C. App. 553, 593 S.E.2d 799, 2004 N.C. App. LEXIS 399 (2004).

Trial Court's Ruling Presumed Correct. —

Since an underinsured motorist carrier did not provide any proof in the record on appeal that a motorist received a benefit from a rehabilitative center that was paid through workers' compensation, since the carrier had the burden, as the appealing party, to provide a complete appellate record demonstrating all the errors, and since the lack of such evidence in the appellate record allowed the appellate court to assume there was sufficient evidence to support the lower court's findings, the lower court properly excluded the amounts paid to the center from its calculation of how much credit the carrier was entitled to against the motorist's personal injury recovery. Walker v. Penn Nat'l SEC. Ins. Co., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 349 (Feb. 15, 2005).

Motion to Amend Denied. —

Appellate court denied a motion to supplement the record on appeal by adding an affidavit providing the basis for service by publication or posting because there was no indication in the trial court's order imposing sanctions or in the record on appeal that the affidavit was part of the trial court record; however, because the case was to be remanded for further proceedings, the trial court could consider whether the affidavit was in the court file at the time the plaintiff filed his complaint and its relevance to whether a violation of G.S. 1A-1, N.C. R. Civ. P. 11 occurred. Adams v. Bank United of Tex. FSB, — N.C. App. —, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004).

Record on Appeal Held Incomplete. —

Where a taxpayer submitted insufficient evidence to meet a burden of proof under G.S. 105-345.2(b) to show that a county board of equalization and review's decision to use the cost valuation assessment method for appraising the taxpayer's property was improper, the taxpayer's appeal was rejected. In re Schwartz & Schwartz, Inc., — N.C. App. —, 603 S.E.2d 852, 2004 N.C. App. LEXIS 2022 (2004).

Applied in In re D.Q.W., — N.C. App. —, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004); State v. Spellman, — N.C. App. —, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004); Krantz v. Owens, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 264 (Feb. 1, 2005).

II. DECISIONS UNDER PRIOR LAW.

E. Evidence.

Omission of Necessary Part of Record. — In a homeowners association's appeal of the trial court's denial of its motion to amend and dismissal of its complaint, the record was incomplete under N.C. R. App. P. 9(a)(1)(e) because the focus of the parties' arguments was the association's failure to exhaust administrative remedies required in the applicable zoning ordinances, and those zoning ordinances were absent from the record on appeal. Beau Rivage Homeowners Ass'n v. Earl, 163 N.C. App. 325, 593 S.E.2d 120, 2004 N.C. App. LEXIS 366 (2004).

Rule 10. Assigning error on appeal.

CASE NOTES

I. In General.
II. Limiting Scope of Review.
  A. Generally.
III. Preserving Questions for Appeal.
  A. Generally.
  B. Jury Instructions; Findings and Conclusions of Judge.
IV. Assignments of Error.
  A. Form; Record References.
  B. Jury Instructions.
  D. Plain Error.

I. IN GENERAL.

Applied in State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004); State v. Cook, 164 N.C. App. 139, 594 S.E.2d 819, 2004 N.C. App. LEXIS 741 (2004); State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004), cert. denied, — U.S. —, 125 S. Ct. 659, 160 L. Ed. 2d 500 (2004); Schenk v. HNA Holdings, Inc., — N.C.

App. —, 604 S.E.2d 689, 2004 N.C. App. LEXIS 2059 (2004); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Shelton, — N.C. App. —, 605 S.E.2d 228, 2004 N.C. App. LEXIS 2178 (2004); State v. Joyner, — N.C. App. —, 606 S.E.2d 196, 2004 N.C. App. LEXIS 2318 (2004); In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004); State v. Jackson, — N.C. App. —, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004); Meehan v. Lawrance, — N.C. App. —, 602 S.E.2d 21, 2004 N.C. App. LEXIS 1731 (2004); State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004); Goforth v. K-Mart Corp., — N.C. App. —, 605 S.E.2d 709, 2004 N.C. App. LEXIS 2378 (2004); Wetchin v. Ocean Side Corp., — N.C. App. —, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005); State v. Davis, — N.C. App. —, 607 S.E.2d 5, 2005 N.C. App. LEXIS 14 (2005); White v. Weyerhaeuser Co., — N.C. App. —, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005); State v. Ewell, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 169 (Jan. 18, 2005); State v. Thaggard, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 250 (Feb. 1, 2005); Krantz v. Owens, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 264 (Feb. 1, 2005); State v. Snipes, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 334 (Feb. 15, 2005); State v. Wood, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 339 (Feb. 15, 2005); Smith v. Jackson County Bd. of Educ., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 347 (Feb. 15, 2005); Howie v. Walsh, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 393 (Mar. 1, 2005).

Cited in In re N.R.M., — N.C. App. —, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004); State v. Moore, — N.C. App. —, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004); State v. Ammons, — N.C. App. —, 606 S.E.2d 400, 2005 N.C. App. LEXIS 11 (2005); Hobbs Staffing Servs. v. Lumbermens Mut. Cas. Co., — N.C. App. —, 606 S.E.2d 708, 2005 N.C. App. LEXIS 174 (2005); In re J.L.S., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 453 (Mar. 1, 2005).

II. LIMITING SCOPE OF REVIEW.

A. Generally.

Although the issue of a trial court's failure to appoint a guardian ad litem for a father in an action to terminate parental rights was not raised by the father in his appeal of the termination order, as was required by N.C. R. App. P. 10(a), the appellate court suspended the requirements of Rule 10(a) and sua sponte considered the issue pursuant to N.C. R. App. P. 2 in order to prevent manifest injustice to the father. In re S.B., — N.C. App. —, 602 S.E.2d 691, 2004 N.C. App. LEXIS 1776 (2004).

III. PRESERVING QUESTIONS FOR APPEAL.

A. Generally.

Failure to Raise Issue in Trial Court. — Where defendant argued on appeal that the trial court committed plain error by failing to declare a mistrial on grounds that some of the jurors were in a position to see defendant in the hallway in handcuffs, but defense counsel did not seek a mistrial and did not object at trial to the trial court's ruling, the issue was not preserved for appellate review pursuant to N.C. R. App. P. 10(c). State v. Peoples, — N.C. App. —, 604 S.E.2d 321, 2004 N.C. App. LEXIS 2055 (2004).

Where a county supervisor of elections did not raise theories before the trial court that the county board of elections and the North Carolina Board of Elections ratified a decision to rehire the supervisor after retirement and that both boards were thereby estopped from denying the supervisor's continued appointment as the county director of elections, the appellate court could not consider those argument for the first time on the supervisor's appeal of a motion granting summary judgment dismissal of a complaint challenging a decision to terminate the supervisor's employment. Revels v. Robeson County Bd. of Elections, — N.C. App. —, 605 S.E.2d 219, 2004 N.C. App. LEXIS 2167 (2004).

Defendant waived appellate review of the trial court's ruling that he attend his co-defendant's sentencing hearing because he made no objection to the court's ruling. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004).

Failure to Obtain a Ruling from the Trial Court — Appellate court refused to consider a condominium association's argument that the trial court erred when it considered affidavits offered by defendant subcontractor before it granted the subcontractor's motion for summary judgment because the trial court did not rule on the association's motion to strike the affidavits and the association did not ask the court for a ruling on its motion. Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 594 S.E.2d 227, 2004 N.C. App. LEXIS 570 (2004).

Burden of Establishing Right to Review Where Not Raised at Trial. —

Because defense counsel did not object to a sergeant's testimony at trial, the appellate court's review was limited to a consideration of plain error pursuant to N.C.R. App. P. 10(b)(1); defendant would be entitled to a new trial only

if showed that the error was so fundamental that, absent the error, the jury probably would have reached a different result. N.C.R. App. P. 10(c)(4). State v. Carrillo, 164 N.C. App. 204, 595 S.E.2d 219, 2004 N.C. App. LEXIS 707 (2004).

Where the injured persons failed to object to the size or composition of the three-commissioner panel of the North Carolina Industrial Commission at any time prior to the close of the hearing on their claim under the North Carolina Childhood Vaccine-Related Injury Compensation Program, G.S. 130A-422 to G.S. 130A-434, the injured parties failed to properly preserve that issue. Goetz v. Wyeth-lederle Vaccines & N.C. Hhs, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 448 (Mar. 1, 2005).

Where Record Did Not Reveal Any Request That Trial Court Make Findings of Fact and Conclusions of Law. — Where the record did not reveal any request by former wife that the trial court make findings of fact and conclusions of law, the former wife's assignment of error asserting that the trial court failed to make those findings and conclusions in dismissing her action was overruled. Elliott v. Estate of Elliott, 163 N.C. App. 577, 596 S.E.2d 819, 2004 N.C. App. LEXIS 512 (2004), cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004).

Issue Not Preserved. —

Defendant did not preserve his claim that the State was improperly allowed to play an inaudible tape for the jury where he objected to the admission of the tape prior to a proper foundation being laid, but he did not object after the trial court ruled that the tape had been properly authenticated. State v. Brice, — N.C. App. —, 604 S.E.2d 356, 2004 N.C. App. LEXIS 2054 (2004).

Passenger's appeal of the reduction of her judgment against defendant in an action for personal injuries sustained in an automobile collision by the amount of her settlement with a third-party defendant, pursuant to G.S. 1B-4, on the ground that she sustained two distinct injuries rather than a single indivisible injury, was dismissed because the passenger did not separate the injuries in the trial court, thus failing to preserve the issue for appeal pursuant to N.C. R. App. P. 10(b)(1). Reinhold v. Lucas, — N.C. App. —, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Illustrative Cases. —

Under N.C. R. App. P. 10(b)(1), defendant's counsel properly preserved for review his objection to the trial court's order allowing the State to present evidence of defendant's alleged prior acts of violence towards his former girlfriend. The trial court had granted a pre-trial motion in limine filed by defense counsel, which precluded the State from presenting evidence concerning defendant's alleged acts of violence towards his former girlfriend during its case in chief; moreover, defense counsel interposed a timely objection as soon as the prosecutor, on cross examination, began to question defendant about his alleged conduct regarding the former girlfriend and thereafter argued vigorously that this evidence should be excluded or a mistrial should be granted. State v. Dennison, 163 N.C. App. 375, 594 S.E.2d 82, 2004 N.C. App. LEXIS 398 (2004).

Although defendant did not raise a specific objection to one of the exhibits the State put forth regarding his prior convictions, defendant's objection to the admission of this evidence in another exhibit, which the court required the State to redact, presented together with the first exhibit, was sufficient to preserve the issue for appellate review. State v. Scott, — N.C. App. —, 607 S.E.2d 10, 2005 N.C. App. LEXIS 8 (2005).

B. Jury Instructions; Findings and Conclusions of Judge.

Objections Required by Subdivision (b)(2). —

Because lessors failed to object to jury instructions before the jury retired to deliberate, they failed to preserve the issue for appellate review as required under N.C. R. App. P. 10(b)(1) and thereby waived their right to appellate review of the jury charge issue. Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004).

Failure to Except to Jury Instructions. —

Since the one business partner did not object in the trial court to certain issues submitted to the jury and the trial court's jury instructions, the one business partner did not preserve those issues for appeal and the appellate court could not review them. Marketplace Antique Mall, Inc. v. Lewis, 163 N.C. App. 596, 594 S.E.2d 121, 2004 N.C. App. LEXIS 415 (2004), cert. denied, 358 N.C. 544, 599 S.E.2d 399 (2004).

In a cardiologist's breach of an employment contract action, where the cardiologist did not object to, or otherwise properly preserve, the issue of whether the trial court erred in denying a requested instruction on contract ambiguity, and where the transcript showed the cardiologist voluntarily withdrew a request for that instruction, the issue was not properly before the appellate court pursuant to N.C. R. App. P. 10(b)(2) and the appellate court dismissed that issue. Maglione v. Aegis Family Health Ctrs., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 150 (Jan. 18, 2005).

IV. ASSIGNMENTS OF ERROR.

A. Form; Record References.

Assignments of error are now mandatory to perfect an appeal.

Even though defendant objected to the admission of certain evidence at trial, when he did not assign error to the admission of this evidence, the appellate court could not review this issue. State v. Clark, — N.C. App. —, 598 S.E.2d 213, 2004 N.C. App. LEXIS 1167 (2004), cert. denied, 358 N.C. 734, 601 S.E.2d 866 (2004), cert. dismissed, 359 N.C. 192, — S.E.2d — (2004) .

Assignment of Error Held Sufficient. —

North Carolina Department of Transportation's assignment of error was overruled because the Department assigned error to the trial court's conclusion of law under a different theory in the record on appeal. DOT v. Elm Land Co., 163 N.C. App. 257, 593 S.E.2d 131, 2004 N.C. App. LEXIS 383 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 42 (2004).

Appellate court had to dismiss the one business partner's assignments of error one through three and eight through nine, as the one business partner omitted the relevant record and transcript references, and those omissions amounted to substantial violations of the appellate rules. Marketplace Antique Mall, Inc. v. Lewis, 163 N.C. App. 596, 594 S.E.2d 121, 2004 N.C. App. LEXIS 415 (2004), cert. denied, 358 N.C. 544, 599 S.E.2d 399 (2004).

Trial court did not commit plain error by failing to intervene ex mero motu to prevent the State from questioning one of the victims' daughters, as the assignment of error submitted by defendant referred to the entirety of the daughter's testimony rather than to any particular portions of her testimony; this broad brush approach failed to distinguish between those parts of the testimony that were relevant to the crimes from those parts dealing with personal matters about the family. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

B. Jury Instructions.

Failure to Demonstrate Prejudice. —

Because the instructions given by the trial court contained purposes not charged in the respective indictments, the instructions were erroneous; however, upon an examination of the instructions and the record in its entirety, the appellate court determined that the defect was not a fundamental error since a different result would not have been reached had the trial court instructed only on the purpose charged in the indictment, and the error in the instructions was not prejudicial. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004).

D. Plain Error.

Review of Instructions to Determine If Plain Error Was Committed. —

Where defendant was afforded ample opportunity to request that the trial judge specify whether a bat could be one of the dangerous weapons used in connection with a robbery and since defendant did not object at trial to the jury's charge on the issue, the appellate court applied plain error review to defendant's claim that the verdict was ambiguous due to the fact that both a gun and a bat were used during the robbery, but it was unclear which weapon the jury determined was the dangerous weapon. State v. Walker, — N.C. App. —, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

Plain Error Review Held Appropriate. — Because defendant did not object to the trial court's submission of any of three aggravating circumstances of commission of kidnapping, pecuniary gain, or commission of other crimes of violence, either alone or in combination with one another, defendant's claim that the aggravating circumstances were based on the same evidence and were inherently duplicitous was reviewed for plain error. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004).

Rule 12. Filing the record; Docketing the appeal; Copies of the record.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in In re D.Q.W., — N.C. App. —, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004).

Rule 13. Filing and service of briefs.

CASE NOTES

Failure to File Brief. —

Dismissal of appeal was required where additional time to file appellate brief was sought and granted, but appellants did not file that brief until 23 days after it was due — which was one week after the opposing parties filed a motion to dismiss the appeal; appellants' egregious violation of N.C. R. App. P. 13, together with other appellate rules violations and the lack of any significant issues or errors requiring appellate review, which would justify a waiver of their violations, required dismissal. Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Applied in Krantz v. Owens, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 264 (Feb. 1, 2005).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14. Appeals of right from Court of Appeals to Supreme Court under G.S. 7A-30.

CASE NOTES

Cited in Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Rule 16. Scope of review of decisions of Court of Appeals.

CASE NOTES

Applied in N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004).

ARTICLE V. EXTRAORDINARY WRITS

Rule 21. Certiorari.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Advanced Wall Sys. v. Highlande Builders, LLC, — N.C. App. —, 605 S.E.2d 728, 2004 N.C. App. LEXIS 2320 (2004); State v. Edgerson, 164 N.C. App. 712, 596 S.E.2d 351, 2004 N.C. App. LEXIS 1013 (2004); Zaliagiris v. Zaliagiris, 164 N.C. App. 602, 596 S.E.2d 285, 2004 N.C. App. LEXIS 1041 (2004).

Rule 22. Mandamus and prohibition.

CASE NOTES

Damages Not Recoverable. — Employee's only remedy to enforce a legal right created by an administrative order for an employer to reinstate the employee to a comparable position to that from which she was terminated was through a writ of mandamus; however, dam-

ages were not recoverable by the employee in an action for an award of a writ of mandamus as a matter of law. Holroyd v. Montgomery County, — N.C. App. —, 606 S.E.2d 353, 2004 N.C. App. LEXIS 2379 (2004).

ARTICLE VI. GENERAL PROVISIONS

Rule 25. Penalties for failure to comply with rules.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Rule 26. Filing and service.

CASE NOTES

Requirements of Rule 26(b) Not Jurisdictional. — Henlajon, Inc. v. Branch Hwys., Inc., 149 N.C. App. 329, 560 S.E.2d 598, 2002 N.C. App. LEXIS 187 (2002).

Failure to serve the notice of appeal required by N.C. R. App. P. 26 at or before the time of filing is not a jurisdictional requirement that automatically requires dismissal. In re D.Q.W., — N.C. App. —, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004).

Double Spacing. —

Defendant's counsel was ordered to pay the costs of printing for an appeal of defendant's conviction of embezzlement, as defendant's brief was single-spaced in violation of N.C. R. App. P. 26(g), which was a mandatory rule. State v. Riley, — N.C. App. —, 605 S.E.2d 212, 2004 N.C. App. LEXIS 2186 (2004).

Rule 28. Briefs: Function and content.

CASE NOTES

I. In General.

I. IN GENERAL.

Two Ways to Preserve Exceptions in Brief. —

Where defendant's appellate brief contained arguments supporting only two of defendant's original 13 assignments of error, the 11 omitted assignments of error were deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208, 2004 N.C. App. LEXIS 729 (2004).

Questions Must Be Presented in Brief. —

Assignments of error that are not briefed on appeal are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5). Thus, where defendant's brief contained arguments supporting only three of the original five assignments of error on his appeal from a judgment convicting him of second-degree trespass and possession of firearms by a felon, the two omitted assignments of error were deemed abandoned pursuant to Rule 28(b)(5), and the court limited its review to those assignments of error addressed in defendant's brief. State v. Boston, — N.C. App. —, 598 S.E.2d 163, 2004 N.C. App. LEXIS 1159 (2004).

Abandonment of Assignments of Error. —

North Carolina Department of Transportation abandoned its argument that a trial court's findings of fact were irrelevant and that the trial court erred in its conclusions of law because it failed to assert legal authority in its brief in support of the claim; furthermore, the Department's assignment of error that the testimony of two witnesses impermissibly stated legal conclusions was overruled because the Department failed to assign error to any specific testimony by either witness on this theory. DOT v. Elm Land Co., 163 N.C. App. 257, 593 S.E.2d 131, 2004 N.C. App. LEXIS 383 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 42 (2004).

Issues Raised in Defendant's Brief, But Not Supported by Argument or Authority,

Are Deemed Abandoned Under N.C. R. App. P. 28(b)(6). — Where a defendant failed to present any argument or authority in support of its four word contention in its brief that the trial court erroneously granted plaintiff's motion for costs, the issue was waived on appeal. PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

Relief as Matter of Appellate Grace. —

By failing to address the interlocutory nature of an order in a brief to the appellate court, the appellants (siblings who were not allowed to intervene in a G.S. 49-14 paternity action) violated N.C. R. App. P. 28(b)(4); however, pursuant to N.C. R. App. P. 2, the appellate court elected, in its discretion, to hear the merits of the appellants' argument. Stockton v. Estate of Thompson, — N.C. App. —, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

Multiple Errors in Brief. —

When the buyers in a dispute over earnest money appealed the trial court's judgment, but their appellate brief made no reference to the record, the 189 pages of testimony, or any of the 16 exhibits, which included several documents totaling over 100 pages, they did not indicate the assignment of error relevant to each argument, and they did not identify any assignment of error by its number or the page where it appeared in the record, it was difficult, if not impossible, to properly determine their appeal, and, considering their other appellate rules violations and the lack of a significant issue or error requiring waiver of their violations, their appeal was dismissed. Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004).

Where Record Did Not Reveal Any Request That Trial Court Make Findings of Fact and Conclusions of Law. — Where the record did not reveal any request by former wife that the trial court make findings of fact and conclusions of law, the former wife's assignment of error asserting that the trial court failed to make those findings and conclusions in dismissing her action was overruled. Elliott v. Estate of Elliott, 163 N.C. App. 577, 596 S.E.2d 819, 2004 N.C. App. LEXIS 512 (2004), cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004).

Applied in State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004); Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); Moses H. Cone Mem. Health Servs. Corp. v. Triplett, — N.C. App. —, 605 S.E.2d 492, 2004 N.C. App. LEXIS 2191 (2004); State v. Allen, 164 N.C. App. 665, 596 S.E.2d 261, 2004 N.C. App. LEXIS 1018 (2004); State v. Bruton, — N.C. App. —, 600 S.E.2d 49, 2004 N.C. App. LEXIS 1508 (2004); State v. Jackson, — N.C. App. —, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004); Wallace v. M, M & R, Inc., — N.C. App. —, 600 S.E.2d 514, 2004 N.C. App. LEXIS 1510 (2004); Sprinkle v. N.C. Wildlife Res. Comm'n, — N.C. App. —, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004); State v. McNeil, — N.C. App. —, 600 S.E.2d 31, 2004 N.C. App. LEXIS 1516 (2004); State v. Taylor, — N.C. App. —, 600 S.E.2d 483, 2004 N.C. App. LEXIS 1519 (2004); Coastal Plains Utils., Inc. v. New Hanover County, — N.C. App. —, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004); Jenkins v. Easco Aluminum, 165 N.C. App. 86, 598 S.E.2d 252, 2004 N.C. App. LEXIS 1158 (2004); Lange v. Lange, — N.C. App. —, 605 S.E.2d 732, 2004 N.C. App. LEXIS 2334 (2004); Dalgewicz v. Dalgewicz, — N.C. App. —, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004); Lewis v. N.C. Dep't of Corr., — N.C. App. —, 606 S.E.2d 199, 2004 N.C. App. LEXIS 2385 (2004); State v. Davis, — N.C. App. —, 607 S.E.2d 5, 2005 N.C. App. LEXIS 14 (2005); Williams v. Bell, — N.C. App. —, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005); State v. Craig, — N.C. App. —, 606 S.E.2d 387, 2005 N.C. App. LEXIS 6 (2005); Lowery v. Duke Univ., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 7 (Jan. 4, 2005); Clawson v. Phil Cline Trucking, Inc., — N.C. App. —, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005); Krantz v. Owens, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 264 (Feb. 1, 2005); State v. Snipes, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 334 (Feb. 15, 2005); Johnson v. Peacock, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 350 (Feb. 15, 2005); State v. Snider, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 395 (Mar. 1, 2005); State v. Hightower, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 454 (Mar. 1, 2005).

Quoted in State v. Canellas, 164 N.C. App. 775, 596 S.E.2d 889, 2004 N.C. App. LEXIS 1136 (2004).

Cited in State v. Cook, 164 N.C. App. 139, 594 S.E.2d 819, 2004 N.C. App. LEXIS 741 (2004); State v. Quinn, — N.C. App. —, 603 S.E.2d 886, 2004 N.C. App. LEXIS 2025 (2004); State v. Oakley, — N.C. App. —, 605 S.E.2d 215, 2004 N.C. App. LEXIS 2185 (2004); In re N.R.M., — N.C. App. —, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004); State v. Moore, — N.C. App. —, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004); State v. Spellman, — N.C. App. —, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004); State v. Batchelor, — N.C. App. —, 606 S.E.2d 422, 2005 N.C. App. LEXIS 9 (2005); Smith v. Richardson Sports Ltd., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 348 (Feb. 15, 2005).

Rule 30. Oral argument.

CASE NOTES

Cited in Holroyd v. Montgomery County, — N.C. App. —, 606 S.E.2d 353, 2004 N.C. App. LEXIS 2379 (2004); State v. Weaver, — N.C. —, — S.E.2d —, 2005 N.C. LEXIS 30 (Feb. 4, 2005).

Rule 31. Petition for rehearing.

CASE NOTES

I. In General.

I. IN GENERAL.

Underinsured Motorist Benefit Dispute. — During a N.C. R. App. P. 31 motion for rehearing, the appellate court determined that a remand to the trial court was necessary to determine the amount due to plaintiff from an insurance company on an underinsured motorist claim pursuant to G.S. 20-279.21, as the stipulation of the parties was not sufficient to determine the amount due since the stipulation did not specify the total loss incurred by plaintiff. Austin v. Midgett, — N.C. App. —, 603 S.E.2d 855, 2004 N.C. App. LEXIS 2020 (2004).

Rule 34. Frivolous appeals; Sanctions.

CASE NOTES

Cited in Stein v. Asheville City Bd. of Educ., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 263 (Feb. 1, 2005).

Rule 37. Motions in appellate courts.

CASE NOTES

I. In General.

I. IN GENERAL.

Motions to an appellate court may not be made in a brief, etc.

Where two companies appealed the trial court's order allowing intervention by two businessmen in an action to recover broker's compensation following the sale of commercial real estate, the businessmens' brief was erroneous in asking the appellate court to dismiss the appeal because such motions could not be made in a brief. Bruggeman v. Meditrust Co., LLC, — N.C. App. —, 600 S.E.2d 507, 2004 N.C. App. LEXIS 1514 (2004).

Rule 40. Consolidation of actions on appeal.

CASE NOTES

Identical Questions of Law. — Where the civil appeals brought by workers exposed to asbestos presented identical questions of law, the court consolidated the appeals pursuant to N.C. R. Civ. P. 40. Schenk v. HNA Holdings, Inc., — N.C. App. —, 604 S.E.2d 689, 2004 N.C. App. LEXIS 2059 (2004).

RULES OF THE JUDICIAL STANDARDS COMMISSION

Rule 9. Notice of formal proceedings.

CASE NOTES

Cited in In re Inquiry Concerning A Judge, — N.C. —, — S.E.2d —, 2005 N.C. LEXIS 199 (Mar. 3, 2005).

RULES FOR SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

Rule 3. Decision by the court.

CASE NOTES

Censure Held Appropriate. —
Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning A Judge, — N.C. —, — S.E.2d —, 2005 N.C. LEXIS 199 (Mar. 3, 2005).

Censure Recommendation Not Appropriate. — Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge since this created grounds for disqualification as the judge's impartiality could reasonably have been questioned; the findings of the Judicial Standards Commission that the judge's conduct violated N.C. Code Jud. Conduct 2A, 3C(1) were supported by the evidence and were adopted by the court. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

CODE OF JUDICIAL CONDUCT

Canon 1. A judge should uphold the integrity and independence of the judiciary.

CASE NOTES

Inappropriate Comments. — Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning A Judge, — N.C. —, — S.E.2d —, 2005 N.C. LEXIS 199 (Mar. 3, 2005).

Canon 2. A judge should avoid impropriety in all his activities.

CASE NOTES

Derogatory Remarks. —

Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning A Judge, — N.C. —, — S.E.2d —, 2005 N.C. LEXIS 199 (Mar. 3, 2005).

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge; this created grounds for disqualification since the judge's impartiality could reasonably have been questioned. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

Censure Recommendation Not Appropriate. — Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Canon 3. A judge should perform the duties of his office impartially and diligently.

CASE NOTES

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge; this created grounds for disqualification since the judge's impartiality could reasonably have been questioned. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

Recusal Not Required. —

G.S. 15A-1223 and N.C. Code Jud. Conduct Canon 3, control the disqualification of a judge presiding over a criminal trial and the burden is on the defendant in an appeal to show objectively that grounds exist consisting of substantial evidence that there exists such a personal bias, prejudice, or interest on the part of the judge that he would be unable to rule impartially. The mere fact that a trial judge is intimately familiar with the proceedings does not automatically require his disqualification, so a the same judge who presided over defendant's murder trial was not disqualified form serving as the presiding judge in a retrospective competency hearing. State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71, 2004 N.C. App. LEXIS 413 (2004), appeal dismissed, cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Derogatory Remarks. —

Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3,

adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning A Judge, — N.C. —, — S.E.2d —, 2005 N.C. LEXIS 199 (Mar. 3, 2005).

Censure Recommendation Not Appropriate. — Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Canon 5. A judge should regulate his extra-judicial activities to ensure that they do not prevent him from carrying out his judicial duties.

CASE NOTES

Recusal Was Erroneous. — Trial judge was erroneously recused in a divorce action upon the motion of plaintiff wife based on the fact that the trial judge and defense counsel shared a vacation property, along with a group of other people, located in the mountains; the joint ownership was not such a frequent transaction to have caused a violation of N.C. Code Jud. Conduct 5(C)(1). Lange v. Lange, — N.C. App. —, 605 S.E.2d 732, 2004 N.C. App. LEXIS 2334 (2004).

RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

With amendments effective October 6, 2004.

Subchapter 1A. Organization of the North Carolina State Bar

Section .0700. Standing Committees of the Council

Section
A.0701. Standing committees and boards.

Subchapter 1D. Rules of the Standing Committees of the North Carolina State Bar

Section .0200. Procedures for the Authorized Practice Committee

D.0203. Definitions.
D.0206. Authorized Practice Committee — Powers and duties.

Section .0100. The Plan for Certification of Paralegals

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SUBCHAPTER 1A. ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0700. STANDING COMMITTEES OF THE COUNCIL

A.0701. Standing committees and boards.

(a) *Standing Committees.* Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) *Executive Committee.* It shall be the duty of the Executive Committee to examine the books and financial records of the State Bar at each regular meeting of the council; to make recommendations to the council on the budget, finances, and annual audit of the State Bar; to receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

(2) *Ethics Committee.* It shall be the duty of the Ethics Committee to study the rules of professional responsibility currently in effect; to make recommen-

dations to the council for such amendment to the rules as the committee deems necessary or appropriate; to study and respond to questions that arise concerning the meaning and application of the rules of professional conduct; to issue opinions in response to questions of legal ethics in accordance with the provisions of Section .0100 of Subchapter 1D of these rules; to consider issues concerning the regulation of lawyers' trust accounts; and to perform such other duties and consider such other matters as the council or the president may designate.

(3) *Grievance Committee.* It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilites set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in panels as assigned by the president. Each panel shall have at least ten members. Two members of each panel shall be non-lawyers, one member may be a lawyer who is not a member of the council, and the remaining members of each panel shall be councilors of the North Carolina State Bar. A quaorum of a panel shall be five members serving at a particular time. Each panel shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances and other matters referred to it by the chairperson of the Grievance Committee. Each panel member shall be furnished a brief description of all matters referred to other panels (and such other available information as he or she may request) and be given a reasonable opportunity to provide comments to such other panels. Each panel's decision respecting the grievances and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a panel decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another panel. The president shall designate a vice-chairperson to preside over, and oversee the functions of, each panel. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) *Authorized Practice Committee.* It shall be the duty of the Authorized Practice Committee to respond to or investigate inquiries and complaints about conduct that may constitute the unauthorized practice of law in accordance with the provisions of Section .0200 of Subchapter 1D of these rules; to study and advise the council on the appropriate and lawful use and regulation of legal assistants, paralegals and other lay person in connection with the provision of law-related services; to the study and advise the council on the regulation of professional organizations; and to perform such other duties and consider such other matters as the council or the president may designate.

(5) *Administrative Committee.* It shall be the duty of the Administrative Committee to study and make recommendations on policies concerning the administration of the State Bar, including the administration of the State Bar's facilities, automation, personnel, retirement plan, publications, and district bars; to oversee the membership functions of the State Bar, including the collection of dues, the suspension of members for failure to pay dues and other fees, and the transfer of members to active or inactive status in accordance with the provisions of Sections .0900 and .1000 of Subchapter 1D of these rules; and to perform such other duties and consider such other matters as the the council or the president may designate. The committee may establish a Publications Board to oversee the regular publications of the State Bar.

(6) *Justice System Committee.* It shall be the duty of the Justice System Committee to assist the council in identifying and advancing the appropriate role of the State Bar in connection with initiatives, programs, legislation and other actions intended to improve access to justice, simplify the law and judicial procedures, and enhance the justice system and the public's confidence in that system; to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of the lawyers of this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(7) *Client Assistance Committee.* It shall be the duty of the Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate.

(8) *Legal Assistance for Military Personnel (LAMP) Committee.* It shall be the duty of the LAMP Committee to serve as liaison for lawyers in the military service in this State; to improve legal services to military personnel and dependents stationed in this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(b) *Boards.* The council of the State Bar shall make appointments to the following boards upon the recommendation of the Executive Committee. The boards are constituents of the North Carolina State Bar and, as standing committees of the State Bar, are subject to the authority of the council.

(1) *Interest on Lawyers' Trust Accounts (IOLTA) Board of Trustees.* The IOLTA Board shall be constituted in accordance with and shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts set forth in Section .1300 of Subchapter 1D of these rules.

(2) *Board of Legal Specialization.* The Board of Legal Specialization shall be constituted in accordance with and shall carry out the provisions of the Plan of Legal Specialization set forth in Section .1700 of Subchapter 1D of these rules.

(3) *Client Security Fund Board of Trustees.* The Client Security Fund Board of Trustees shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar set forth in Section .1400 of Subchapter 1D of these rules.

(4) *Board of Continuing Legal Education (CLE).* The Board of Continuing Legal Education shall be constituted in accordance with and shall carry out the provisions of the Continuing Legal Education Rules and Regulations of the North Carolina State Bar set forth in Sections .1500 and .1600 of Subchapter 1D of these rules.

(5) *Lawyer Assistance Program Board.* The Lawyer Assistance Program Board shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Lawyer Assistance Program of the North Carolina State Bar set forth in Section .0600 of Subchapter 1D of these rules.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective June 12, 1996; Amended effective February 3, 2000; Amended effective October 6, 2004.

SUBCHAPTER 1D. RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0200. PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

D.0203. Definitions.

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, have the meanings set forth in this rule, unless the context clearly indicates otherwise.

(1) *Appellate division.* The appellate division of the General Court of Justice.

(2) *Chairperson of the Authorized Practice Committee.* The councilor appointed to serve as chairperson of the Authorized Practice Committee of the State Bar.

(3) *Complainant or the complaining witness.* Any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) *Complaint.* A formal pleading filed in the name of the North Carolina State Bar in the superior court against a person, firm or corporation after a finding of probable cause.

(5) *Council.* The Council of the North Carolina State Bar.

(6) *Councilor.* A member of the Council of the North Carolina State Bar.

(7) *Counsel.* The counsel of the North Carolina State Bar appointed by the council.

(8) *Court or courts of this state.* A court authorized and established by the Constitution or laws of the state of North Carolina.

(9) *Defendant.* Any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) *Investigation.* The gathering of information with respect to alleged unauthorized practice of law.

(11) *Investigator.* Any person designated to assist in investigation of alleged unauthorized practice of law.

(12) *Letter of notice.* A communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

(13) *Office of the counsel.* The office and staff maintained by the Counsel of the North Carolina State Bar.

(14) *Office of the secretary.* The office and staff maintained by the secretary of the North Carolina State Bar.

(15) *Party.* After a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(16) *Plaintiff.* After a complaint has been filed, the North Carolina State Bar.

(17) *Preliminary hearing.* Hearing by the Authorized Practice Committee to determine whether probable cause exists.

(18) *Probable Cause.* A finding by the Authorized Practice Committee that there is reasonable cause to believe that a person or corporation has engaged in the unauthorized practice of law justifying legal action against such person or corporation.

(19) *Secretary.* The secretary of the North Carolina State Bar.

(20) *Supreme Court.* The Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended October 6, 2004.

D.0206. Authorized Practice Committee — Powers and duties.

The Authorized Practice Committee shall have the power and duty:

(1) to direct to the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in this State;

(2) to hold preliminary hearings, find probable cause, and recommend to the Executive Committee that a complaint for injunction be filed in the name of the State Bar against the respondent;

(3) to dismiss allegations of the unauthorized practice of law upon a finding of no probable cause;

(4) to issue letters of caution, which may include a demand to cease and desist, to respondents in cases where the Committee concludes either that:

a. there is probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) respondent has agreed to refrain from engaging in the conduct in the future;

(ii) respondent is unlikely to engage in the conduct again; or

(iii) either referral to a district attorney or complaint for injunction is not warranted under the circumstances; or

b. there is no probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) the conduct of the respondent may be improper and may become the basis for injunctive relief if continued or repeated; or

(ii) the Committee otherwise finds it appropriate to caution the respondent.

(5) to direct counsel to stop an investigation and take no action;

(6) to refer a matter to another agency, including the district attorney for criminal prosecution and to other committees of the North Carolina State Bar; and

(7) to issue advisory opinions in accordance with procedures adopted by the Council as to whether the actual or contemplated conduct of nonlawyers would constitute the unauthorized practice of law in North Carolina.

History Note: Statutory Authority G.S. 84-37, Readopted effective December 8, 1994, Amended effective February 20, 1995; Amended effective February 3, 2000; Amended effective October 6, 2004.

SECTION .0100. THE PLAN FOR CERTIFICATION OF PARALEGALS

SUBCHAPTER 1G. THE PLAN FOR CERTIFICATION OF PARALEGALS

G.0101. Purpose.

The purpose of this plan for certification of paralegals (plan) is to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of those individuals by establishing mandatory continuing legal education and other requirements of certification.

G.0102. Jurisdiction; Authority.

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Paralegal Certification (board), which board shall have jurisdiction over the certification of paralegals in North Carolina.

G.0103. Operational Responsibility.

The responsibility for operating the paralegal certification program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

G.0104. Size and Composition of Board.

The board shall have nine members, five of whom must be lawyers in good standing and authorized to practice law in the state of North Carolina. One of the members who is a lawyer shall be a program director at a qualified paralegal studies program. Four members of the board shall be paralegals certified under the plan, provided, however, that the paralegals appointed to the inaugural board shall be exempt from this requirement during their initial and successive terms.

G.0105. Appointment of Members; When; Removal.

(a) *Appointment.* The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member shall be selected by the council from two nominees determined by a vote by mail of all active certified paralegals in an election conducted by the board.

(b) *Procedure for nomination by mail.* At least 30 days prior to a meeting of the council at which one or more paralegal members of the board are subject to appointment for a full three year term, a notice shall be mailed to all active certified paralegals at each certified paralegal's address of record on file with the North Carolina State Bar. The notice shall state how many paralegal positions on the board are subject to appointment, state that nominees will be selected by means of written ballots distributed to and returned by certified paralegals by mail, and identify how, by when when and to whom nominations may be made. The board shall mail a ballot to each active certified paralegal at the certified paralegal's address of record on file with the North Carolina State Bar. The ballot shall be accompanied by written instructions and state when and where the ballot should be returned. Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The board shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election as well as how many ballots are returned. Only original ballots will be accepted. The names of the two nominees receiving the most votes for each open paralegal position shall be forwarded to the council.

(c) *Time of Appointment.* The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually at the quarterly meeting of the council occurring on the anniversary of the appointment of the initial board.

(d) *Vacancies.* Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council, subject to the requirements of Rule .0105(a)1, at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

(e) *Removal.* Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

G.0106. Term of Office.

Subject to Rule .0107 of this subchapter, each member of the board shall serve for a term of three years beginning as of the first day of the month following the date on which the council appoints the member.

G.0107. Staggered Terms.

The members of the board shall be appointed to staggered terms such that three members are appointed in each year. Of the initial board, three members (one lawyer and two paralegals) shall be appointed to terms of one year; three members (two lawyers and one paralegal) shall be appointed to terms of two years; and three members (two lawyers and one paralegal) shall be appointed to terms of three years. Thereafter, three members (lawyers or paralegals as necessary to fill expired terms) shall be appointed in each year for full three year terms.

G.0108. Succession.

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

G.0109. Appointment of Chairperson.

The council shall appoint the chairperson of the board from among the lawyer members of the board. The term of the chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

G.0110. Appointment of Vice-Chairperson.

The council shall appoint the vice-chairperson of the board from among the members of the board. The term of the vice-chairperson shall be one year. the vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

G.0111. Source of Funds.

Funding for the program carried out by the board shall come from such application fees, examination fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

G.0112. Fiscal Responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) *Maintenance of Accounts: Audit —.* The North Carolina State bar shall maintain a separate account for funds of the board such that such funds and

expenditures there from can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) *Investment Criteria* —. The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursement* —. Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

G.0113. Meetings.

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson. Notice of meeting shall be given at least one day prior to the meeting by mail, electronic mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be five or more of the members serving at the time of the meeting.

G.0114. Annual Report.

The board shall prepare a report of its activities for the preceding year and shall present the same at the annual meeting of the council.

G.0115. Powers and Duties of the Board.

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to certification of paralegals and shall have the power and duty

(1) to administer the plan of certification for paralegals;

(2) to appoint, supervise, act on the recommendations of, and consult with committees as appointed by the board or the chairperson;

(3) to certify paralegals or deny, suspend or revoke the certification of paralegals;

(4) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(5) to propose and request the council to make amendments to this plan whenever appropriate;

(6) to cooperate with other boards or agencies in enforcing standards of professional conduct;

(7) to evaluate and approve continuing legal education courses for the purpose of meeting the continuing legal education requirements established by the board for the certification of paralegals; and

(8) to cooperate with other organizations, boards and agencies engaged in the recognition, education or regulation of paralegals.

G.0116. Retained Jurisdiction of the Council.

The council retains jurisdiction with respect to the following matters:

(1) amending this plan;

(2) hearing appeals taken from actions of the board;

(3) establishing or approving fees to be charged in connection with the plan;

(4) regulating the conduct of lawyers in the supervision of paralegals; and

(5) determining whether to pursue injunctive relief as authorized by G.S. 84-37 against persons acting in violation of this plan.

G.0117. Privileges Conferred and Limitations Imposed.

The board in the implementation of this plan shall not alter the following privileges and responsibilities of lawyers and their non-lawyer assistants.

(1) No rule shall be adopted which shall in any way limit the right of a lawyer to delegate tasks to a non-lawyer assistant or to employ any person to assist him or her in the practice of law.

(2) No person shall be required to be certified as a paralegal to be employed by a lawyer to assist the lawyer in the practice of law.

(3) All requirements for and all benefits to be derived from certification as a paralegal are individual and may not be fulfilled by nor attributed to the law firm or other organization or entity employing the paralegal.

(4) Any person certified as a paralegal under this plan shall be entitled to represent that he or she is a "North Carolina Certified Paralegal (NCCP)", a "North Carolina State Bar Certified Paralegal (NCSB/CP)" or a "Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification."

G.0118. Certification Committee.

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the certification committee. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term.

(b) Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the committee. All members shall be eligible for reappointment to not more than one additional three-year term, provided, however, that the board may reappoint the chairperson of the committee to a third three-year term if the board determines that the reappointment is in the best interest of the program. Meetings of the certification committee shall be held at regular intervals at such times, places and upon such notices as the committee may from time to time prescribe or upon direction of the board.

(c) The committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan by advising the board as to standards for certification of individuals as paralegals. The committee shall be charged with actively administering the plan as follows:

(1) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of paralegals and for procedures with respect thereto;

(2) administer procedures established by the board for evaluation of applications for certification and continued certification as a paralegal and for denial, suspension, or revocation of such certification;

(3) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as paralegals; and

(4) perform such other duties and make such other recommendations as may be delegated to or requested by the board.

G.0119. Standards for Certification of Paralegals.

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) *Education.* The applicant must have earned one of the following:

a. an associate's, bachelor's, or master's degree or post-baccalaureate certificate from a qualified paralegal studies program; or

b. an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Deparment of Education; and successfully completed 18 or more semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.

A qualified paralegal studies program is a program of paralegal or legal assistant studies that is approved by the House of Delegates of the American Bar Association, or that offers at least the equivalent 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education, and is an institutional member of the Southern Association of Colleges and Schools or other regional accrediting agency recognized by the United States Department of Education.

(2) *Examination.* The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

(b) *Alternative Qualification Period.* For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:

(1) earned a high school diploma, or its equivalent, worked as a paralegal in North Carolina for not less than 5000 hours during the five years prior to application, and completed three hours of continuing legal education in professional responsibility, as approved by the board;

(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)êrtified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board, and worked as a paralegal in North Carolina for not less than 2000 hours during the two years prior to application; or

(3) fulfilled the educational requirements set forth in Rule .0119(a)(1)a. or b. and worked as a paralegal in North Carolina for not less than 2000 hours during the two years prior to application.

(c) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness or fitness as a paralegal; or

(4) the individual is not a legal resident of the United States.

(d) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, examinations and examination scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the

effective administration of this plan, fairness to the applicant and due process of law.

G.0120. Standards for Continued Certification of Paralegals.

(a) The period of certification as a paralegal shall be one (1) year. During such period the board may require evidence from the paralegal of his or her continued qualification for certification as a paralegal, and the paralegal must consent to inquiry by the board regarding the paralegal's continued competence and qualification to be certified. Application for and approval of continued certification shall be required annually prior to the end of each certification period. To qualify for continued certification as a paralegal, an applicant must demonstrate participation in not less than 6 hours of credit in board approved continuing legal education, or its equivalent, during the year within which the application for continued certification is made.

(b) Upon written request of the paralegal, the board may for good cause shown waive strict compliance by such paralegal with the criteria relating to continuing legal education, as those requirements are set forth in Rule .0120(a).

G.0121. Lapse, Suspension or Revocation of Certification.

(a) The board may revoke its certification of a paralegal, after hearing before the board on appropriate notice, upon a finding that

(1) the certification was made contrary to the rules and regulations of the board;

(2) the individual certified as a paralegal made a false representation, omission or misstatement of material fact to the board;

(3) the individual certified as a paralegal failed to abide by all rules and regulations promulgated by the board;

(4) the individual certified as a paralegal failed to pay the fees required;

(5) the individual certified as a paralegal no longer meets the standards established by the board for the certification of paralegals; or

(6) the individual is not eligible for certification on account of one or more of the grounds set forth in Rule .0019(c)

(b) An individual certified as a paralegal has a duty to inform the board promptly of any fact or circumstance described in Rule .0121(a).

(c) If an individual's certification lapses, or if the board revokes a certification, the individual cannot again be certified as a paralegal unless he or she so qualifies upon application made as if for initial certification and upon such other conditions as the board may prescribe. If the board suspends certification of an individual as a paralegal, such certification cannot be reinstated except upon the individual's application and compliance with such conditions and requirements as the board may prescribe.

G.0122. Right to Hearing and Appeal to Council.

An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a hearing before the board and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council may prescribe.

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THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

Revised effective February 27, 2003,
with amendments effective October 6, 2004.

A complete set of all referenced ethics opinions may be obtained from the North Carolina State Bar. Contact Jennifer Eichenberger, Director of Communications, P.O. Box 25908, Raleigh, N.C. 27611.

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Rule 1.11. Special conflicts of interest for former and current government officers and employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government informa-

tion" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(B) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client under Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtain-

able only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement nor do they specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely significantly to injure the client, a reasonable delay may be justified.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended February 27, 2003; Amended October 6, 2004.

Rule 1.15-3. Records and accountings.

(a) *Minimum records for accounts at banks.* The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following:

(1) all bank receipts or deposit slips listing the source and date of receipt of all funds deposited in the account, and, in the case of a general trust account, also the name of the client or other person to whom the funds belong;

(2) all canceled checks or other instruments drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each instrument is drawn, provided, that:

(i) digital images must be legible reproductions of the front and back of the original instruments with no more than six instruments per page and no images smaller than 1-3⁄16 x 3 inches; and

(ii) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original instruments upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account;

(4) all bank statements and other documents received from the bank with respect to the trust account, including, but not limited to notices of return or dishonor of any instrument drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

(b) *Minimum records for accounts at other financial institutions.* The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all depository receipts or deposit slips listing the source and date of receipt of all property deposited in the account;

(2) a copy of all checks or other instruments drawn on the account, or printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any instrument drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(c) *Quarterly reconciliations of general trust accounts.* At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank balance for the trust account as a whole. The lawyer shall retain all records pertaining to the quarterly reconciliations of the general trust account for a period of six years.

(d) *Accountings for trust funds.* The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

(e) *Accountings for fiduciary property.* Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners, or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

(f) *Minimum record keeping period.* A lawyer shall maintain, in accordance with this Rule 1.15, complete and accurate records of all entrusted property received by the lawyer, which records shall be maintained for a period of at least six (6) years from the last transaction to which the records pertain.

(g) *Audit by state bar.* The financial records required by this Rule 1.15 shall be subject to audit for cause and to random audit by the North Carolina State Bar; and such records shall be produced for inspection and copying in North Carolina upon request by the State Bar.

History Note: Statutory Authority G.S. 84-23, Adopted May 4, 2000; Amended February 27, 2003; Amended October 6, 2004.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.3. Direct contact with potential clients.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a potential client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall include the words "This is an advertisement for legal services" on the outside envelope, if a written communication sent by mail, and at the beginning of the body of the written or electronic communication in print as large or larger than the lawyers or law firm's name and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal services plan subject to the following:

(1) *Definition.* A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of the need for the service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director, or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

(2) *Conditions for participation.*

(A) The plan must be operated by an organization that is not owned or directed by the lawyer;

(B) The plan must be registered with the North Carolina State Bar and comply with all applicable rules regarding such plans;

(C) The lawyer must notify the State Bar in writing before participating in a plan and must notify the State Bar no later than 30 days after the lawyer discontinues participation in the plan;

(2)(D) After reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with the Revised Rules of Professional Conduct and other pertinent rules of the State Bar;

(E) All advertisements by the plan representing that it is registered with the State Bar shall also explain that registration does not constitute approval by the State Bar; and

(F) Notwithstanding the prohibitions in paragraph (a), the plan may use in-person or telephone contact to solicit memberships or subscriptions provided:

(i) The solicited person is not known to need legal services in a particular matter covered by the plan; and

(ii) The contact does not involve coercion, duress, or harassment and the communication with the solicited person is not false, deceptive or misleading.

(e) For purposes of this rule, a potential client is a person with whom a lawyer would like to form a client-lawyer relationship.

COMMENT

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of potential clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a potential client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to potential client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a potential client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the

lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a potential client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] Paragraph (c) of this Rule requires that all direct mail solicitations of potential clients must be mailed in an envelope on which the statement "This is an advertisement for legal services" appears. Postcards may not be used for direct mail solicitations. The advertising disclosure statement must also appear at the beginning of an enclosed letter or electronic communication in print at least as large as the print used for the lawyer's or law firm's name in the letterhead or masthead. The requirement that certain communications be marked "This is an advertisement for legal services" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rule 7.3(d) as well as Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

History Note: Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended effective February 5, 2002; Amended February 27, 2003; Amended October 6, 2004.

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RULES GOVERNING ADMISSION TO PRACTICE OF LAW

Effective February 1, 1976,
with amendments received effective October 6, 2004.

Section .0900. Examinations

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.0902. Dates.

SECTION .0900. EXAMINATIONS

Rule .0902. Dates.

The written bar examinations shall be held in the City of Raleigh, Wake County or adjoining counties in the months of February and July on such dates as the board may set from year to year.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; amended October 6, 2004.

INDIGENT DEFENSE SERVICES

Adopted July 1, 2001, with amendments through November 12, 2004

Part 2
Rules for Providing Legal Representation in Capital Cases

Subpart 2A. Appointment and Compensation in Capital Cases.

Rule
2A.4. Compensation and Recoupment.

Subpart 2B. Appointment and Compensation of Appellate Counsel in Capital Cases.
2B.3. Compensation and Recoupment.

Subpart 2C. Appointment of Post-Conviction Counsel in Capital Cases.
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PART 2
RULES FOR PROVIDING LEGAL REPRESENTATION IN CAPITAL CASES

Subpart 2A. Appointment and Compensation of Trial Counsel in Capital Cases.

Rule 2A.4. Compensation and Recoupment.

(a) *Compensation.* Appointed counsel who represented an indigent capital defendant at trial shall submit to the IDS Director an itemized fee application on a form prescribed by the IDS Director, showing the time counsel spent in trial representation of the defendant. Following review of the fee application, the IDS Director shall determine the amount of compensation and forward the award to the Administrative Office of the Courts for payment. If counsel is required pursuant to paragraph 2A.5(a)(iv) below to meet with the IDS Director to review the representation, the fee shall include compensation for time spent in that review. Private counsel appointed to represent an indigent capital defendant may apply for and receive interim payments in the discretion of the IDS Director. Counsel may make a written request for a review of the amount of compensation approved by the IDS Director from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review.

(b) *Recoupment of Fees Generally.* To the extent required by law, capital defendants for whom counsel has been appointed under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the defendant of the potential liability, and afford the defendant a reasonable opportunity to be heard on the issue. The trial judge shall then determine the amount to be recouped if recoupment is required by law.

(c) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be

determined in accordance with the terms of the contract if recoupment is required by law.

(d) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any compensation for representation as appointed counsel other than that awarded by the IDS Director. (Adopted July 1, 2001; Subsection (d) adopted effective November 12, 2004.)

Subpart 2B. Appointment and Compensation of Appellate Counsel in Capital Cases.

Rule 2B.3. Compensation and Recoupment.

(a) *Compensation.* Appointed counsel who represented an indigent capital defendant on appeal shall submit to the IDS Director an itemized fee application on a form prescribed by the IDS Director, showing the time counsel spent in appellate representation of the defendant. Following review of the fee application, the IDS Director shall determine the amount of compensation and forward the award to the Administrative Office of the Courts for payment. If counsel is required pursuant to paragraph 2B.4(b)(iii) below to meet with the Appellate Defender or others to review the representation, the fee shall include compensation for time spent in that review. Private counsel appointed to represent an indigent capital defendant may apply for and receive interim payments in the discretion of the IDS Director. Counsel may make a written request for a review of the amount of compensation determined by the IDS Director from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review.

(b) *Recoupment of Fees Generally.* To the extent required by law, capital defendants for whom counsel has been appointed under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender or appellate defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the defendant of the potential liability, and afford the defendant a reasonable opportunity to be heard on the issue. The trial judge shall then determine the amount to be recouped if recoupment is required by law.

(c) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(d) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any compensation for representation as appointed counsel other than that awarded by the IDS Director. (Adopted July 1, 2001; Subsection (d) adopted effective November 12, 2004.)

Subpart 2C. Appointment of Post-Conviction Counsel in Capital Cases.

Rule 2C.3. Compensation and Recoupment.

(a) *Compensation.* Appointed counsel who represented an indigent capital defendant in post-conviction proceedings shall submit to the IDS Director an itemized fee application on a form prescribed by the IDS Director, showing the time counsel spent in post-conviction representation of the defendant. Follow-

ing review of the fee application, the IDS Director shall determine the amount of compensation and forward the award to the Administrative Office of the Courts for payment. If counsel is required pursuant to paragraph 2C.4(a)(iv) below to meet with the IDS Director to review the representation, the fee shall include compensation for time spent in that review. Private counsel appointed to represent a capital defendant on post-conviction may apply for and receive interim payments in the discretion of the IDS Director. Counsel may make a written request for a review of the amount of compensation determined by the IDS Director from a subcommittee of the IDS Commission designated by the IDS Commission to conduct such review.

(b) *Recoupment of Fees Generally.* To the extent required by law, capital defendants for whom counsel has been appointed under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender or appellate defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the defendant of the potential liability, and afford the defendant a reasonable opportunity to be heard on the issue. The trial judge shall then determine the amount to be recouped if recoupment is required by law.

(c) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(d) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any compensation for representation as appointed counsel other than that awarded by the IDS Director. (Adopted July 1, 2001; Subsection (d) adopted effective November 12, 2004.)

PART 3
RULES FOR PROVIDING LEGAL REPRESENTATION IN NON-CAPITAL CRIMINAL APPEALS AND NON-CRIMINAL APPEALS

This third part addresses the procedure to be followed when a person is entitled to appointed counsel on appeal to the Appellate Division from adverse decisions in the Trial Division in both non-capital criminal proceedings and non-criminal proceedings. The rules are authorized by the Indigent Defense Services Act of 2000 (IDS Act), S.L. 2000-144, Senate Bill 1323, and apply to cases pending on or after July 1, 2001. Fee applications for appellate representation filed on or after that date will be governed by these rules.

The rules supercede the provisions on appellate representation in Section D. of the Rules and Regulations of the North Carolina State Bar (State Bar Rules) and any provisions on appellate representation in local bar plans issued pursuant to the State Bar Rules. As of July 1, 2001, those rules, which were authorized by former G.S. 7A-459, are no longer effective.

Whenever the term "IDS Director" is used in these rules, it means the Director of the Office of Indigent Defense Services or his or her designee. Whenever the term "IDS Office" is used in these rules, it means the Office of Indigent Defense Services or its designee. Whenever the term "IDS Commission" is used in these rules, it means the Commission on Indigent Defense Services or its designee.

These rules may be changed by the IDS Commission pursuant to its authority. (Adopted July 1, 2001; amended November 15, 2002.)

Rule 3.3. Compensation of Appellate Counsel.

(a) *Setting of Fee.* Assigned private appellate counsel of record shall be compensated in an amount determined by the IDS Director following consultation with the Appellate Defender, except that the IDS Director shall not consult with the Appellate Defender concerning the fee to be paid to counsel assigned pursuant to paragraph 3.2(d) above. If counsel is required pursuant to paragraph 3.4(f)(iii) below to meet with the Appellate Defender to review the representation, the fee shall include compensation for time spent in that review.

(b) *Fee Application.* After a person's appeal becomes final, assigned private counsel shall submit to the Appellate Defender, or to the IDS Director in a conflict case, an itemized fee application on a form prescribed by the Appellate Defender, showing the time counsel spent in appellate representation of the person. Following review of the fee application, the Appellate Defender shall forward the application to the IDS Director with a recommendation concerning the amount to be paid. The IDS Director shall fix the fee to be paid and forward the award to the Administrative Office of the Courts for payment. Assigned private appellate counsel may apply for interim payments.

(c) *Recoupment of Fees Generally.* To the extent required by law, persons who have been appointed counsel under this part shall continue to be responsible for repaying the fees paid to such counsel or, in the case of representation by a public defender or appellate defender office, the value of services rendered by counsel. After the IDS Director sets the fee to be paid or the value of services rendered, the IDS Director shall notify the person potentially responsible for paying the fees of the potential liability, and afford the person a reasonable opportunity to be heard on the issue. The trial judge shall then determine the amount to be recouped if recoupment is required by law.

(d) *Recoupment for Contract Services.* For legal representation rendered by attorneys working under contract with the IDS Office, the value of services, and the procedures for entry of any appropriate orders or judgments, shall be determined in accordance with the terms of the contract if recoupment is required by law.

(e) *Outside Compensation Prohibited.* Once counsel has been appointed to represent a person in a case subject to this part, counsel shall not accept any compensation for representation as appointed counsel other than that awarded by the IDS Director. (Adopted July 1, 2001; Subsection (e) adopted effective November 12, 2004.)

Appendix: Indigent Defense Performance Guidelines.

Commission on Indigent Defense Services
Adopted November 12, 2004

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

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Preface

The primary goal of the Commission on Indigent Defense Services ("IDS Commission") is to ensure that indigent defendants in North Carolina are afforded high quality legal representation. *See* G,S. 7A-498.1(2). To further that goal, the Indigent Defense Services Act of 2000 directs the Commission to establish "[s]tandards for the performance of public defenders and appointed counsel." G.S. 7A-498.5(c)(4).

These performance guidelines are based largely on the "Performance Guidelines for Criminal Defense Representation" that have been promulgated by the National Legal Aid and Defender Association, as well as a review of standards and guidelines in several other jurisdictions, including Connecticut, Kansas, Massachusetts, New Mexico, New York City, Oregon, and Washington. Over a period of several months, a Committee of the IDS Commission reviewed a draft of these guidelines and revised them to fit the nuances of North Carolina law and practice. Initial proposed guidelines were then sent to 70 public and private defense attorneys around the state, with a request that they provide feedback. Based on the comments that were received, the Committee made a number of changes to that earlier draft. In August 2004, the revised guidelines were mailed to all public defenders and assistant public defenders, more than 2,000 private defense attorneys, all active district and superior court judges, and all elected district attorneys for comments. Again, based on the comments that were received, the Committee made a number of improvements to the guidelines. The full IDS Commission then adopted the attached performance guidelines on November 12, 2004.

These performance guidelines cover all indigent adult non-capital criminal cases in district and superior court. The guidelines are intended to identify issues that may arise at each stage of a criminal proceeding, and to recommend effective approaches to resolving those issues. Because all provisions will not be applicable in all cases, the guidelines direct counsel to use his or her best professional judgment in determining what steps to undertake in specific cases. The Commission hopes these guidelines will be useful as a training tool and resource for new and experienced defense attorneys, as well as a tool for potential systemic reform in some areas. The guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims or attorney disciplinary proceedings.

The IDS Commission believes that providing high quality criminal defense representation is a difficult and challenging endeavor, which requires great skill and dedication. That skill and dedication is demonstrated by defense counsel across North Carolina on a daily basis, and the Commission commends those counsel. The Commission recognizes that the goals embodied in these guidelines will not be attainable without sufficient funding and resources, and hopes the North Carolina General Assembly will continue its support of quality indigent defense services.

The IDS Commission thanks all of the defense attorneys who zealously represent indigent defendants across the state. In addition, the Commission thanks everyone who worked on the drafting of these performance guidelines and who offered comments. The Commission plans to review and revise the guidelines on a regular basis to ensure that they continue to comply with North Carolina law and reflect quality performance, and invites ongoing feedback from the defense bar and criminal justice community.

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North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

SECTION 1:

Guideline 1.1 Function of Performance Guidelines

(a) The Commission on Indigent Defense Services hereby adopts these performance guidelines to promote one of the purposes of the Indigent Defense Services Act of 2000—improving the quality of indigent defense representation in North Carolina—and pursuant to G.S. 7A-498.5(c)(4).

(b) These guidelines are intended to serve as a guide for attorney performance in non-capital criminal cases at the trial level, and contain a set of considerations and recommendations to assist counsel in providing quality representation for indigent criminal defendants. The guidelines also may be used as a training tool.

(c) These are performance guidelines, not standards. The steps covered in these guidelines are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. In deciding what steps are appropriate, counsel should use his or her best professional judgment.

Guideline 1.2 Role of Defense Counsel

(a) The paramount obligations of criminal defense counsel are to provide zealous and quality representation to their clients at all stages of the criminal process, and to preserve, protect, and promote their clients' rights and interests throughout the criminal proceedings. Attorneys also have an obligation to conduct themselves professionally, abide by the Revised Rules of Professional Conduct of the North Carolina State Bar and other ethical norms, and act in accordance with all rules of court.

(b) Defense counsel are the professional representatives of their clients. Counsel should candidly advise clients regarding the probable success and consequences of adopting any posture in the proceedings, and provide clients with all information necessary to make informed decisions. Counsel does not have an obligation to execute any directive of a client that does not comport with law or standards of ethics or professional conduct.

Guideline 1.3 Education, Training and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in North Carolina. Counsel should also be informed of any applicable local rules, including those set forth in the district's case docketing plan, as well as the practices of the specific judge before whom a case is pending.

(b) Counsel has an ongoing obligation to stay abreast of changes and developments in criminal law and procedure, and to continue his or her legal education, skills training, and professional development.

(c) Prior to accepting appointment to an indigent criminal matter, counsel should have sufficient experience, skills, training, and supervision to provide quality representation. Where appropriate to provide competent representation, counsel should consult with more experienced attorneys to acquire

necessary knowledge and information, including information about the practices of judges, prosecutors, and other court personnel.

Guideline 1.4 General Duties of Defense Counsel

(a) Before accepting appointment to an indigent criminal case, an attorney has an obligation to ensure that he or she has available sufficient time, resources, knowledge, and experience to afford quality representation to a defendant in a particular matter. If it later appears that counsel is unable to afford quality representation in the case, counsel should move to withdraw. If counsel is allowed to withdraw, he or she should cooperate with new counsel to the extent that such cooperation is in the best interests of the client and in accord with the Revised Rules of Professional Conduct.

(b) Counsel must be alert to all actual and potential conflicts of interest that would impair their ability to represent a client. If counsel identifies an actual conflict of interest, counsel should immediately move to withdraw. If counsel identifies a potential conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients. Where appropriate, counsel may seek an advisory opinion on any potential conflicts from the North Carolina State Bar. Mere tactical disagreements between counsel and a client ordinarily do not justify withdrawal from a case. If it is necessary for counsel to withdraw, counsel should do so in a way that protects the client's rights and interests, and does not violate counsel's ethical duties to the client.

(c) Counsel has an obligation to maintain regular contact with the client and keep the client informed of the progress of the case. Counsel should promptly comply with a client's reasonable requests for information, and reply to client correspondence and telephone calls.

(d) Counsel should appear on time for all scheduled court hearings in a client's case. If scheduling conflicts arise, counsel should resolve them in accordance with Rule 3.1 of the General Rules of Practice.

(e) Counsel should never give preference to retained clients over appointed clients, or suggest that retained clients should or would receive preference.

SECTION 2:

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

Where appropriate, counsel has an obligation to attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.

Guideline 2.2 Initial Interview

(a) Counsel shall arrange for an initial interview with the client as soon as practicable after being assigned to the client's case. Absent exceptional circumstances, if the client is in custody, the initial interview should take place within three business days after counsel receives notice of assignment to the client's case. If necessary, counsel may arrange for a designee to conduct the initial interview.

(b) *Preparation:*

Prior to conducting the initial interview, the attorney should, where possible:

(1) be familiar with the charges against the client, as well as the elements and potential punishment of each charged offense;

(2) obtain copies of any relevant documents that are available, including copies of any charging documents, recommendations and reports made by pretrial service or detention agencies concerning pretrial release, and law enforcement reports;

(3) be familiar with the legal criteria for determining pretrial release conditions and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set, as well as any written policies of the judicial district, and whether any pretrial service or other agencies are available to act as a custodian for the client's release; and

(5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

(c) *The Interview:*

(1) The purpose of the initial interview is to acquire information from the client concerning pretrial release and, where appropriate, the facts of the case, and to provide the client with information concerning the case. Counsel should try to ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview.

(2) Information that should be acquired during the initial interview includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, employment record and history, and immigration status (if applicable);

(B) the client's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and educational and armed services history;

(C) the client's immediate medical and/or mental health needs;

(D) the client's past criminal history, if any, including arrests and convictions for adult and juvenile offenses and prior history of court appearances or failure to appear in court;

(E) the existence of any other pending charges against the client and the identity of any other appointed or retained counsel;

(F) whether the client is on probation or parole, and the client's past or present performance under supervision;

(G) the ability of the client to meet any financial conditions of release; and

(H) the names of individuals or other sources that counsel can contact to verify the information provided by the client, and the permission of the client to contact those individuals.

(3) Information to be provided to the client during the initial interview includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency, and an explanation that the client is not required to and should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting the attorney;

(D) the nature of the charges and potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(F) how counsel can be reached and when counsel plans to have contact with the client next;

(G) realistic answers, where possible, to the client's most urgent questions; and

(H) what arrangements will be made or attempted for the satisfaction of the client's most pressing needs, such as medical or mental health attention, and contact with family members.

(4) Where appropriate, counsel should be prepared at the initial interview to ask the client to sign a release authorizing counsel to access confidential information.

(d) *Additional Information*

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(1) the facts surrounding the charges against the client and the client's view of any potential defenses;

(2) any evidence of improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved; and

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Guideline 2.3 Pretrial Release Proceedings in Misdemeanor and Felony Cases

(a) As soon as possible after appointment, where the client has not been able to obtain pretrial release, counsel should consider filing a motion to reduce bond or otherwise modify any pretrial release conditions that were set by the magistrate or other judicial official at the client's initial appearance.

(b) Counsel should be prepared to present to the appropriate judicial official a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release. Counsel should consider the potential consequences of allowing the client to make statements at any bond reduction hearing.

(c) In counties with a pretrial service program, counsel should consider utilizing the services of that program where it would be likely to benefit the client.

(d) Counsel should fully inform the client of his or her conditions of release after such conditions have been set by the court.

(e) If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should be familiar with and explain to the client the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how properly to post such assets.

(f) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the jail, and if appropriate the court, to any special medical or psychiatric and security needs of the client that are known to counsel.

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Guideline 2.4 Probable Cause Hearing in Felony Cases

(a) Counsel should discuss with the client the meaning of probable cause and the procedural aspects surrounding a probable cause determination, and should consider the tactical advantages and disadvantages of having a probable cause hearing. Counsel should consider any concessions the prosecution might make if the defendant waives, or does not oppose a continuance of, a probable cause hearing. Before waiving a probable cause hearing, counsel should consider the possible benefits of a hearing, including the potential for discovery and the development of impeachment evidence. Counsel also should be aware of all consequences if the client waives a probable cause hearing, including the effect of waiver on the statutory deadline for requesting voluntary discovery under G.S. 15A-902(d).

(b) In preparing for a probable cause hearing, counsel should consider:

(1) the elements of each of the offenses alleged;

(2) the law for establishing probable cause;

(3) factual information that is available concerning the existence or lack of probable cause;

(4) the tactics of full or partial cross-examination;

(5) additional factual information and impeachment evidence that could be discovered by counsel during the hearing; and

(6) any continuing need to pursue modification of the conditions of release if the client is in custody.

Counsel ordinarily should not call the client or defense witnesses to testify at the probable cause hearing unless there are sound tactical reasons for doing so.

Guideline 2.5 Charging Language in Criminal Pleadings

(a) Counsel should review the criminal pleadings in all cases and, unless there are sound tactical reasons for not doing so, move to dismiss the pleading if there are defects in the charging language, including but not limited to:

(1) the pleading does not list all of the essential elements of the charged offense; and

(2) the pleading contains more than one charge in a single count.

(b) Even if the pleading adequately charges a crime, counsel should be sufficiently familiar with the language of the pleading to recognize a fatal variance at trial and move to dismiss the charge if the evidence is insufficient to support the charge as pled.

(c) Counsel should be aware of all time limits applicable to challenges to defects in the charging language of a criminal pleading. Counsel also should be aware of the potential consequences of alerting the prosecution to defects in the charging language.

Guideline 2.6 Indictments and Bills of Information in Felony Cases

(a) Upon return of a bill of indictment, unless there are sound tactical reasons for not doing so, counsel should consider any potential grounds for quashing the indictment or challenges to the grand jury proceedings, including, but not limited to:

(1) improper composition of the grand jury as a whole, including any systematic exclusion of qualified persons either in the drawing of the list of potential grand jurors or the selecting of grand jurors from the list;

(2) the inclusion of a grand juror who does not meet the requirements of G.S. 9-3;

(3) the bill of indictment lacks the signatures and markings required by G.S. 15A-644;

(4) the bill of indictment was not found to be true by at least twelve grand jurors and/or was not returned in open court; and

(5) the bill of indictment was based entirely on the testimony of witnesses who were disqualified or evidence that is incompetent.

(b) Counsel should be aware of all time limits applicable to motions to quash the indictment or challenges to the grand jury proceedings.

(c) Where applicable, counsel should consider, and inform the client of, the advantages and disadvantages of waiving a bill of indictment and consenting to a bill of information pursuant to G.S. 15A-642 and G.S. 15A-923.

Guideline 2.7 Arraignment in Felony Cases

Counsel should consider whether to request arraignment under G.S. 15A-941(d). Counsel should be aware that some pretrial motions may be waived if they are not filed at or before arraignment (or within the time limit prescribed by G.S. 15A-952 if arraignment is waived), including a motion to continue, motion challenging venue or for change of venue, motion to join or sever offenses, motion challenging grand jury composition, motion for a bill of particulars, and motion challenging non-jurisdictional pleading defects. Counsel should also consult local calendaring rules to determine whether they establish different deadlines for pretrial motions.

SECTION 3:

Guideline 3.1 Search Warrants and Prosecution Requests for Non-Testimonial Evidence

(a) Counsel should be familiar with the law governing search warrants under G.S. 15A-241 *et seq.* and applicable case law, including, but not limited to, the requirements for a search warrant application, the basis for issuing a search warrant, the required form and content of a search warrant, the execution and service of a search warrant, and the permissible scope of the search.

(b) Counsel should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as participation in an in-person lineup, handwriting exemplars, and physical specimens), the potential consequences if a defendant refuses to comply with a non-testimonial identification order issued pursuant to G.S. 15A-271 *et seq.*, and the extent to which counsel may participate in or observe the proceedings.

Guideline 3.2 Client's Competence and Capacity to Proceed

(a) When defense counsel has a good faith doubt as to the client's capacity to proceed in a criminal case, counsel may:

(1) file an *ex parte* motion to obtain the services of a mental health expert and thereby determine whether to raise the client's competency before the court; or

(2) file a motion questioning the client's competence to stand trial or enter a plea under G.S. 15A-1001(a) and applicable case law, in which case the court may order a mental health examination at a state mental health facility or by the appropriate local forensic examiner.

(b) While the client's wishes ordinarily control, counsel may question competency without the client's assent or over the client's objection if necessary.

(c) After counsel receives and reviews the report from any court-ordered competency examination, counsel should consider whether to file a motion requesting a formal hearing on the client's capacity to proceed.

(d) Whenever competency is at issue, counsel still has a continuing duty to prepare the case for all anticipated court proceedings.

(e) If the court enters an order finding the client incompetent and orders involuntary commitment proceedings to be initiated, defense counsel ordinarily will not represent the client at those proceedings, but should cooperate with the commitment attorney upon request.

SECTION 4:

Guideline 4.1 Case Review, Investigation, and Preparation

(a) Counsel has a duty to conduct an independent case review and investigation. The client's admissions or statements to counsel of facts constituting guilt do not necessarily obviate the need for such independent review and investigation. The review and investigation should be conducted as promptly as possible.

(b) Sources of review and investigative information may include the following:

(1) *Charging Documents, Statutes, and Case Law*

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the client is charged;

(B) the defenses, ordinary and affirmative, that may be available, as well as the proper manner and timeline for asserting any available defenses; and

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations, double jeopardy, or irregularities in the grand jury proceedings.

(2) *The Client*

An in-depth interview or interviews of the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s);

(B) elicit information concerning possible improper police investigative practices or prosecutorial conduct that may affect the client's rights;

(C) explore the existence of other potential sources of information relating to the offense or client, including school, work, jail, probation, and prison records;

(D) collect information relevant to sentencing; and

(E) continue to assess the client's medical and/or mental health needs.

(3) *Potential Witnesses*

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the client. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be

available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) *The Police and Prosecution*

Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so (*e.g.*, defense obligations under G.S. 15A-905).

(5) *The Courts*

If possible, counsel should request and review any tapes or transcripts from previous hearings in the case. Counsel should also review the client's prior court file(s) where appropriate.

(6) *Information in the Possession of Third Parties*

Where appropriate, counsel should seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

(7) *Physical Evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should view the physical evidence consistent with case needs.

(8) *The Scene*

Where appropriate, counsel or an investigator should view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the alleged offense.

(9) *Assistance from Experts, Investigators, and Interpreters*

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate to:

(A) prepare a defense;

(B) adequately understand the prosecution's case;

(C) rebut the prosecution's case; and/or

(D) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

If counsel determines that expert or investigative assistance is necessary and appropriate, counsel should file an *ex parte* motion setting forth the particularized showing of necessity required by *Ake v. Oklahoma*, *State v. Ballard*, and their progeny. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court. Counsel should take all necessary steps to preserve for appeal any denial of expert, investigative, or interpreter funding.

(c) During case preparation and throughout trial, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of when and how to raise those objections. Counsel should also consider how best to respond to objections that could be raised by the prosecution.

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Guideline 4.2 Discovery in Cases Within the Original Jurisdiction of the Superior Court

(a) Counsel has a duty to pursue discovery procedures provided by the applicable rules of criminal procedure within the time periods prescribed by G.S. 15A-902, and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

(b) Prior to filing a formal motion with the court, counsel must first serve the prosecutor with a written request for voluntary discovery unless counsel and the prosecutor agree in writing to comply voluntarily with G.S. 15A-901 *et seq.* Counsel must file a motion to compel discovery if the prosecution's response is unsatisfactory or delayed. Regardless of the prosecution's response, counsel should file a motion to compel discovery if the case is proceeding to trial.

(c) In exceptional cases, counsel should consider not making a discovery request or signing a written agreement under G.S. 15A-902(a), on the ground that it will trigger a defense obligation to disclose evidence under G.S. 15A-905.

(d) Unless there is a sound tactical reason for not requesting discovery or signing a written agreement under G.S. 15A-902(a) (*e.g.*, defense obligations under G.S. 15A-905), counsel should seek discovery to the broadest extent permitted under federal and state law, including but not limited to, the following items:

(1) all information to which the defendant is entitled under G.S. 15A-903;

(2) all potential exculpatory information and evidence to which the defense is entitled under *Brady v. Maryland* and its progeny, including but not limited to:

(A) impeachment evidence, such as a witness' prior convictions or other misconduct; bias of a witness; a witness' capacity to observe, perceive, or recollect; and psychiatric evaluations of a witness;

(B) evidence discrediting police investigation and credibility;

(C) evidence undermining the identification of the client;

(D) evidence tending to show the guilt of another;

(E) the identity of favorable witnesses; and

(F) exculpatory physical evidence; and

(3) to the extent not provided under statutory discovery, any other information necessary to the defense of the case, including but not limited to:

(A) the names, addresses, and availability of state witnesses;

(B) the details of the circumstances under which any oral or written statements by the accused or a co-defendant were made;

(C) any evidence of prior bad acts that the prosecution may intend to use against the client;

(D) the data underlying any expert reports; and

(E) any evidence necessary to enable counsel to determine whether to file a motion to suppress evidence under G.S. 15A-971 *et seq.*

(e) Counsel should seek the timely production and preservation of discoverable evidence. If the prosecution fails to disclose or belatedly discloses discoverable evidence, counsel should consider requesting one or more of the sanctions provided by G.S. 15A-910.

(f) If counsel believes the state may destroy or consume in testing evidence that is significant to the case (*e.g.*, rough notes of law enforcement interviews, 911 tapes, drugs, or blood samples), counsel should also file a motion to preserve the evidence in the event that it is discoverable.

(g) Counsel should timely comply with all of the requirements in G.S. 15A-905 governing disclosure of evidence by the defendant and notice of defenses and expert witnesses. Counsel also should be aware of the possible sanctions for failure to comply with those requirements under G.S. 15A-910.

Guideline 4.3 Theory of the Case

During case review, investigation, and trial preparation, counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis for the client's acquittal or conviction of a lesser offense, while also telling the defense story of innocence, reduced culpability, or unfairness. The theory of the case furnishes the basic position from which counsel determines all actions in a case.

SECTION 5:

Guideline 5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing appropriate pretrial motions whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief which the court has authority to grant.

(b) The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Among the issues that counsel should consider addressing in pretrial motions are:

(1) the pretrial custody of the client and a motion to review conditions of release;

(2) the constitutionality of the implicated statute or statutes;

(3) any potential defects in the grand jury composition or charging process;

(4) the sufficiency of the charging document under all applicable statutory and constitutional provisions;

(5) the dismissal of a charge on double jeopardy grounds;

(6) the need for a bill of particulars;

(7) the propriety and prejudice of any joinder or severance of charges or defendants;

(8) the statutory and constitutional discovery obligations of the prosecution;

(9) the suppression of evidence gathered as the result of violations of the North Carolina Constitution and the United States Constitution, including:

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the client's right to counsel, or privilege against self-incrimination; and

(D) unreliable identification evidence that would give rise to a substantial likelihood of irreparable misidentification;

(10) the suppression of evidence gathered in violation of any right, duty, or privilege arising out of North Carolina law;

(11) access to necessary support or investigative resources or experts;

(12) the need for a change of venue;

(13) the defendant's speedy trial rights and/or calendaring rights under G.S. 7A-49.4;

(14) the defendant's right to a continuance in order adequately to prepare his or her case;

(15) matters of trial evidence that may be appropriately litigated by means of a pretrial motion in *limine*;

(16) the suppression of a prior conviction obtained in violation of the defendant's right to counsel;

(17) the recusal of the trial judge;

(18) the full recordation of all proceedings pursuant to G.S. 15A-1241;

(19) matters of trial or courtroom procedure; and

(20) notice of affirmative defenses if required by G.S. 15A-905(c) and G.S. 15A-959.

(c) Counsel should be aware of all time limits on the filing of pretrial motions, and should know whether a motion must or may be accompanied by a factual affidavit.

(d) Unless there are sound tactical reasons for not doing so, counsel should request that the court rule on all previously filed defense motions.

Guideline 5.2 Filing and Arguing Pretrial Motions

(a) Motions should be filed in a timely manner, should comport with the formal requirements of statute and court rules, and should succinctly inform the court of the authority relied upon.

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery, and research relevant to the claim(s) advanced;

(2) the subpoenaing of all helpful evidence, and the subpoenaing and preparation of all helpful witnesses;

(3) full understanding of the burdens of proof, evidentiary principles and procedures applying to the hearing, including the benefits and costs of having the client and other defense witnesses testify;

(4) obtaining the assistance of an expert witness where appropriate and necessary; and

(5) preparation and submission of a memorandum of law where appropriate.

(c) If a hearing on a pretrial motion is held in advance of trial, counsel should attempt to obtain the transcript of the hearing for use at trial where appropriate.

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue that is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew pretrial motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial. In doing so, counsel should fully explain to the client the rights that would be waived by a decision to enter a plea and not proceed to trial.

(b) Counsel should keep the client fully informed of any plea discussions and negotiations, and convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.

(c) Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel should also explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if counsel believes the client's decisions are not in his or her best interest, counsel should attempt to persuade the client to change his or her position.

(d) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that plea negotiations fail.

(e) Counsel should not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Counsel should ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, and prosecuting attorney that may affect the content and likely results of a negotiated plea bargain.

(b) To develop an overall negotiation plan, counsel should be fully aware of, and fully advise the client of:

(1) the maximum term of imprisonment that may be ordered under the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, and mandatory consecutive sentence requirements;

(2) the possibility of forfeiture of assets seized in connection with the case;

(3) any registration requirements, including sex offender registration;

(4) the likelihood that a conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(5) the possibility of earned-time credits;

(6) the availability of appropriate diversion or rehabilitation programs;

(7) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution; and

(8) the effect on the client's appellate rights.

Counsel should also discuss with the client that there may be other potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) declining to assert the right to proceed to trial on the merits of the charges;

(B) refraining from asserting or litigating any particular pretrial motion(s);

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) waiving challenges to validity or proof of prior convictions; and

(F) waiving the right to indictment and consenting to a bill of information on a related but unindicted offense;

(2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest the denial of a suppression motion;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will not present certain information;

(3) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(4) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty in which the defendant retains the right to appeal the denial of a suppression motion, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether the plea agreement is binding on the court and prison authorities.

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, including its advantages, disadvantages, and potential consequences.

(b) When counsel reasonably believes that acceptance of a plea offer is in the client's best interests, counsel should attempt to persuade the client to accept the plea offer. However, the decision to enter a plea of guilty ultimately rests with the client.

Guideline 6.4 Entry of the Plea before the Court

(a) Prior to the entry of a plea, counsel should:

(1) fully explain to the client the rights he or she will waive by entering the plea;

(2) fully explain to the client the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering a plea; and

(3) fully explain to the client the nature of the plea hearing and prepare the client for the role he or she may play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are made part of the transcript of plea.

(c) Subsequent to the acceptance of a plea, counsel should review and explain the plea proceedings to the client, and respond to any client questions and concerns.

Commission on Indigent Defense Services
Adopted November 12, 2004

SECTION 7:

Guideline 7.1 General Trial Preparation

(a) Throughout preparation and trial, counsel should consider the theory of the defense and ensure that counsel's decisions and actions are consistent with that theory.

(b) The decision to proceed to trial rests solely with the client. Counsel should discuss with the client the relevant strategic considerations of this decision. When appropriate, counsel should also explain to the client that decisions concerning trial strategy are ordinarily to be made by counsel, after consultation with the client and investigation of the applicable facts and law. However, counsel should be aware that, under North Carolina law, if counsel and a fully informed competent client reach an absolute impasse as to tactical decisions, the client's wishes may control.

(c) In advance of trial, counsel should take all steps necessary to complete thorough investigation, discovery, and research. Among the steps counsel should consider in preparation are:

(1) interviewing and subpoenaing all potentially helpful witnesses;

(2) examining and subpoenaing all potentially helpful physical or documentary evidence;

(3) obtaining funds for defense investigators and experts, and arranging for defense experts to consult and/or testify on issues that are potentially helpful;

(4) obtaining and reading transcripts of any prior proceedings in the case or related proceedings; and

(5) obtaining photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may aid the fact finder in understanding the defense case.

(d) Where appropriate, counsel should have the following information and materials available at the time of trial:

(1) copies of all relevant documents filed in the case;

(2) relevant documents prepared by investigators;

(3) reports, test results, and other materials disclosed by the prosecution pursuant to G.S. 15A-901 *et seq.*;

(4) *voir dire* topics, plans, or questions;

(5) a plan, outline, or draft of opening statement;

(6) cross-examination plans for all possible prosecution witnesses;

(7) direct-examination plans for all prospective defense witnesses;

(8) copies of defense subpoenas;

(9) prior statements of all prosecution witnesses (*e.g.*, transcripts, police reports);

(10) prior statements of all defense witnesses;

(11) reports from defense experts;

(12) a list of all defense exhibits, and the witnesses through whom they will be introduced;

(13) originals and copies of all documentary exhibits;

(14) proposed jury instructions with supporting case citations;

(15) copies of critical statutes and cases; and

(16) a plan, outline, or draft of closing argument.

(e) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that reasonably can be anticipated to arise in the trial.

(f) Counsel should be familiar with case law concerning making admissions of guilt to the jury without the client's consent.

(g) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (*e.g.*, use of prior convictions to impeach the defendant) and, where appropriate, should prepare motions and memoranda for such advance rulings.

(h) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should try to ensure that the client does not appear before the jury in jail or other inappropriate clothing, or in shackles or handcuffs. If an incarcerated client is brought before the jury in jail clothing, shackles, or handcuffs, counsel should object and seek appropriate relief from the court.

(i) Counsel should plan with the client, court personnel, and/or sheriff's office for the most convenient system for conferring throughout the trial.

(j) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Guideline 7.2 Preserving the Record on Appeal

Counsel should establish a proper record for appellate review throughout the trial process, including requesting recordation of all significant portions of the trial under G.S. 15A-1241(b). If something non-verbal transpires during trial that is relevant and important, counsel should ask to have the record reflect what happened.

Guideline 7.3 *Voir Dire* and Jury Selection

(a) *Preparation*

(1) Counsel should be familiar with the procedures by which a jury panel is selected, and should be alert to any potential legal challenges to the composition or selection of the panel.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from the panel, and should be alert to any potential legal challenges to those procedures.

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list where feasible, and should develop a method for tracking juror selection and seating.

(4) Counsel should be familiar with any juror questionnaire that may be used by the court or prosecution and, where appropriate, should develop a defense questionnaire and file a pretrial motion to authorize its use.

(5) In advance of trial, counsel should develop *voir dire* topics, plans, or questions that are tailored to the specific case. Among the purposes *voir dire* questions should be designed to serve are:

(A) to elicit information about the attitudes of individual jurors, which will inform the use of peremptory strikes and challenges for cause;

(B) to determine the jurors' attitudes toward legal principles that are critical to the defense case, including, where appropriate, the client's decision not to testify; and

(C) to present the client, preview the defense case, and assess the impact of damaging information on the jurors' ability to fairly consider the case.

In conducting *voir dire*, counsel should be aware that jurors may develop impressions of counsel and the defendant, and should recognize the importance of establishing a relationship of credibility.

(6) Counsel should be familiar with the law concerning mandatory and discretionary *voir dire* inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

(7) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel also should be aware of the statutory and case law directing that peremptory challenges need to be exhausted in order to preserve for appeal the denial of any challenges for cause.

(b) *Examining the Prospective Jurors*

(1) Counsel should personally conduct the *voir dire* examination of the panel.

(2) If the court denies counsel's request to ask questions during *voir dire* that are significant or necessary to the defense of the case, counsel should take all steps necessary to protect the *voir dire* record for appeal, including filing a written motion listing the proposed *voir dire* questions or otherwise making proposed questions part of the record.

(3) If the *voir dire* questions may elicit sensitive answers or where otherwise appropriate, counsel should request individual *voir dire*.

(c) *Challenges and Objections*

(1) Counsel should consider challenging for cause all persons who are subject to challenge under G.S. 15A-1212, including all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case, when it is likely to benefit the client.

(2) When a challenge for cause is denied, counsel should consider exercising a peremptory challenge to remove the juror. Counsel should be aware of the requirements in G.S. 15A-1214(h) for preserving the denial of a challenge for cause for appellate review.

(3) In exercising challenges for cause and peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

(4) Counsel should object to and preserve for appellate review all issues relating to the unconstitutional exclusion of jurors by the prosecution or court.

Guideline 7.4 Opening Statement

(a) Prior to delivering an opening statement, counsel should consider whether to ask for sequestration of witnesses.

(b) Counsel should be familiar with North Carolina law and the individual trial judge's practices regarding the permissible content of an opening statement. Counsel should consider the need to, and if appropriate, ask the court to instruct the prosecution not to mention in opening statement contested evidence for which the court has not determined admissibility.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement.

(d) Counsel's objectives in making an opening statement may include the following:

(1) to introduce the theory of the defense case;

(2) to provide an overview of the defense case;

(3) to identify the weaknesses of the prosecution's case;

(4) to emphasize the prosecution's burden of proof;

(5) to summarize the anticipated testimony of witnesses, and the role of each in relationship to the entire case;

(6) to describe the exhibits that will be introduced and the role of each in relationship to the entire case;

(7) to clarify the jurors' responsibilities;

(8) to state the ultimate inferences counsel wants the jury to draw;

(9) to personalize the client and counsel for the jury; and

(10) to prepare the jury for the client's testimony or decision not to testify.

(e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement into the defense opening statement and summation.

(f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless sound tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecutor's error; and

(2) the possibility that an objection might enhance the significance of the information in the jurors' minds, or otherwise negatively affect the jury.

Guideline 7.5 Confronting the Prosecution's Case

(a) Counsel should anticipate weaknesses in the prosecution's proof, and research and prepare to argue corresponding motions for judgment of dismissal or nonsuit.

(b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

(c) Unless sound tactical reasons exist for not doing so, counsel should make timely objections and motions to strike improper state evidence, and assert all possible statutory and constitutional grounds for exclusion of the evidence. If evidence is admissible only for a limited purpose, counsel should consider requesting an appropriate limiting instruction.

(d) In preparing for cross-examination, counsel should be familiar with North Carolina law and procedures concerning cross-examination and impeachment of witnesses. Counsel should be prepared to question witnesses as to the existence and content of prior statements.

(e) In preparing for cross-examination, counsel should:

(1) consider the need to integrate cross-examination, the theory of the defense, and closing argument;

(2) consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary or might elicit responses harmful to the defense case;

(3) anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal, and consider a cross-examination plan for each of the anticipated witnesses;

(4) be alert to inconsistencies, variations, and contradictions within each witness' testimony;

(5) be alert to inconsistencies, variations, and contradictions between different witnesses' testimony;

(6) if applicable, review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

(7) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

(8) be alert to issues relating to witness credibility, including bias and motive for testifying; and

(9) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(f) Counsel should consider conducting a *voir dire* examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the law concerning competency of witnesses in general, and admission of expert testimony in particular, to be able to raise appropriate objections.

(g) Before beginning cross-examination, counsel should ascertain whether the prosecutor provided copies of all prior statements of prosecution witnesses as required by G.S. 15A-903(a). If disclosure was not properly made, counsel should request relief as appropriate under G.S. 15A-910, including:

(1) a cautionary instruction;

(2) adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess if necessary;

(3) exclusion of the witness' testimony and all evidence affected by that testimony;

(4) a mistrial;

(5) dismissal of the case; and/or

(6) any other sanctions counsel believes would remedy the violation.

(h) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of dismissal or nonsuit on each count charged. Where appropriate, counsel should be prepared with supporting case law.

Guideline 7.6 Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not presenting defense evidence, and instead relying on the evidence and inferences, or lack thereof, from the prosecution's case.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, including but not limited to, the likelihood of cross-examination and impeachment concerning prior convictions and prior bad acts that affect credibility.

(c) Counsel should be aware of the elements of any affirmative defense(s) and know whether the defense bears a burden of persuasion or production. Counsel should be familiar with the notice requirements for affirmative defenses and introduction of expert testimony that are imposed by G.S. 15A-905(c), G.S. 15A-959, and North Carolina case law.

(d) In preparing for presentation of a defense case, counsel should, where appropriate:

(1) develop a plan for direct examination of each potential defense witness;

(2) determine the implications that the order of witnesses may have on the defense case;

(3) consider the possible use of character witnesses and any negative consequences that may flow from such testimony;

(4) consider the need for expert witnesses;

(5) consider the use of demonstrative evidence and the order of exhibits; and

(6) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for rebuttal by the prosecution.

(f) Counsel should prepare all defense witnesses for direct examination and possible cross-examination. Where appropriate, counsel should also advise witnesses and the defendant of suitable courtroom dress and demeanor.

(g) If a prosecution objection is sustained or defense evidence is improperly excluded, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof.

(h) Counsel should conduct redirect examination as appropriate.

(i) At the close of all of the evidence, counsel should renew the motion for judgment of dismissal or nonsuit on each charged count.

Guideline 7.7 Closing Argument

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation, including the law governing closing arguments under G.S. 7A-97 and G.S. 15A-1230, Rule 10 of the General Rules of Practice for the Superior and District Courts, and North Carolina case law.

(b) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

(1) highlighting weaknesses in the prosecution's case;

(2) describing favorable inferences to be drawn from the evidence;

(3) incorporating into the argument:

(A) the theory of the defense case;

(B) helpful testimony from direct and cross-examinations;

(C) verbatim instructions drawn from the expected jury charge;

(D) responses to anticipated prosecution arguments; and

(E) visual aids and exhibits; and

(4) the effects of the defense argument on the prosecution's rebuttal argument.

(c) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, seeking cautionary instructions, or requesting a mistrial unless sound tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

(1) the possibility that an objection or cautionary instruction might enhance the significance of the information in the jurors' minds;

(2) whether, with respect to a motion for mistrial, counsel believes that the case will result in a favorable verdict for the client; and

(3) the need to preserve the objection for appellate review.

Guideline 7.8 Jury Instructions

(a) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of pattern charges, and preserving objections to the instructions.

(b) Pursuant to G.S. 15A-1231, counsel should submit in writing proposed special instructions or modifications of the pattern jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide case law in support of the proposed instructions. Counsel should try to ensure that all jury instruction discussions are on the record.

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court does not adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record for appeal, including filing a copy of proposed instructions pursuant to G.S. 15A-1231.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

(f) If there are grounds for objecting to any jury instructions, counsel should object before the verdict form is submitted to the jury and the jury is allowed to begin deliberations.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should ask the judge to state the proposed charge to counsel before it is delivered to the jury. Counsel should also try to ensure that any supplemental instructions are given to the entire jury in open court pursuant to G.S. 15A-1234(d).

SECTION 8:

Guideline 8.1 Obligations of Counsel in Sentencing

Counsel's obligations in the sentencing process include:

(a) where a defendant chooses not to proceed to trial, to attempt to negotiate a plea agreement with consideration of the sentencing, correctional, and financial implications;

(b) to try to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

(c) to ensure that all reasonably available mitigating and favorable evidence, which is likely to benefit the client, is presented to the court;

(d) to develop a plan that seeks to achieve the sentencing alternative most favorable to the client, and that reasonably can be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;

(e) to try to ensure that all information presented to the court which may harm the client, if inaccurate, untruthful, or otherwise improper, is stricken from the text of any sentencing services plan or presentence report;

(f) to consider the need for and availability of sentencing specialists, or mental health or mental retardation professionals; and

(g) to identify and preserve potential issues for appeal.

Guideline 8.2 Sentencing Options, Consequences, and Procedures

(a) Counsel should be familiar with and advise the client of the sentencing provisions and options applicable to the case, including:

(1) the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, mandatory consecutive sentence requirements, and constitutional limits on sentences;

(2) deferred prosecution, prayer for judgment continued, probation without a conviction, and diversionary programs;

(3) probation or suspension of sentence, and mandatory and permissible conditions of probation;

(4) confinement in a mental institution;

(5) forfeiture of assets seized in connection with the case;

(6) any mandatory registration requirements, including sex offender registration, or mandatory DNA testing; and

(7) the possibility of expungement and sealing of records.

(b) Counsel should be familiar with and advise the client of the direct and collateral consequences of the judgment and sentence, including:

(1) credit for pretrial detention;

(2) the likelihood that the conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(3) the possibility of earned-time credits;

(4) the availability of correctional programs and work release;

(5) the availability of drug rehabilitation programs, psychiatric treatment, and health care; and

(6) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution.

Counsel should also discuss with the client that there may be other potential collateral consequences of the judgment and sentence, such as deportation or other effects on immigration status; motor vehicle

or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) Counsel should be familiar with the sentencing procedures, including:

(1) the effect that plea negotiations may have upon the sentencing discretion of the court;

(2) the procedural operation of the applicable sentencing system, including concurrent and consecutive sentencing;

(3) the practices of those who prepare the sentencing services plan or presentence report, and the defendant's rights in that process;

(4) access to the sentencing services plan or presentence report by counsel and the defendant;

(5) the defense sentencing presentation and/or sentencing memorandum;

(6) the opportunity to challenge information presented to the court for sentencing purposes;

(7) the availability of an evidentiary hearing to challenge information, and the applicable rules of evidence and burdens of proof at such a hearing; and

(8) the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Guideline 8.3 Preparation for Sentencing

In preparing for sentencing, counsel should consider the need to:

(a) inform the client of the applicable sentencing requirements, options, and alternatives, and the sentencing judge's practices and procedures if known;

(b) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(c) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical and mental health history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;

(d) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, after considering the possible consequences that any admission of guilt may have on an appeal, subsequent retrial, or trial on other offenses;

(e) inform the client of the effects that admissions and other statements may have on an appeal, retrial, or other judicial proceedings, such as collateral or restitution proceedings;

(f) inform the client if counsel will ask the court to consider a particular sentence or range of sentences; and

(g) collect and present documents and affidavits to support the defense position and, where relevant, prepare and present witnesses to testify at the sentencing hearing.

Guideline 8.4 The Sentencing Services Plan or Presentence Report

(a) Counsel should be familiar with the procedures concerning the preparation and submission of a sentencing services plan or presentence report, and should consider the tactical implications of requesting that a plan be prepared.

(b) If a plan is prepared, counsel should:

(1) provide to the official preparing the plan relevant information favorable to the client, including, where appropriate, the client's version of the offense;

(2) prepare the client to be interviewed by the person preparing the plan;

(3) review the completed plan and discuss it with the client;

(4) try to ensure the client has adequate time to examine the completed plan; and

(5) take appropriate steps to ensure that erroneous or misleading information that may harm the client is challenged or deleted from the plan.

Guideline 8.5 The Prosecution's Sentencing Position

Unless there is a sound tactical reason for not doing so, counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed, including the factual basis for any sentence in the aggravated range.

Guideline 8.6 The Defense Sentencing Theory

Counsel should prepare a defense sentencing presentation and, where appropriate, a defense sentencing memorandum. Among the topics counsel may wish to include in the sentencing presentation or memorandum are:

(a) information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(b) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

(c) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(d) challenges to incorrect or incomplete information, and inappropriate inferences and characterizations that are before the court; and

(e) a defense sentencing proposal.

Guideline 8.7 The Sentencing Process

(a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's legal rights and interests.

(b) Where appropriate, counsel should be prepared to present supporting evidence, including testimony of witnesses, affidavits, letters, and public records, to establish the facts favorable to the defendant.

(c) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement and psychiatric treatment or drug rehabilitation, and against deportation or exclusion of the defendant.

(d) Where appropriate, counsel should prepare the client to personally address the court. In addition, counsel should prepare any expert and other witnesses to address the court.

(e) After the sentencing hearing is complete, counsel should fully explain to the client the terms of the sentence, including any conditions of probation.

SECTION 9:

Guideline 9.1 Appeal of Misdemeanor Conviction for Trial *de Novo* in Superior Court

(a) When a defendant has been convicted of a misdemeanor in district court, except where the defendant explicitly waives his or her right to appeal as part of a plea agreement, counsel should advise the client of the right to appeal for trial *de novo* with a jury in superior court. Counsel should also advise the client of the potential advantages and disadvantages of exercising that right.

(b) Counsel should be aware of, and advise the client of, the time limit for *de novo* appeal set forth in G.S. 15A-1431(c).

Guideline 9.2 Motion for Appropriate Relief in the Trial Division

(a) Counsel should be familiar with the procedures available under G.S. 15A-1411 *et seq.* to seek a new trial, dismissal of charges, or other relief. Counsel should be aware of the grounds for relief that must be asserted within 10 days after entry of judgment, and the grounds that may be asserted more than 10 days after entry of judgment.

(b) When a judgment has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for appropriate relief with the trial court pursuant to G.S. 15A-1414. In deciding whether to file such a motion, the factors counsel should consider include:

(1) the likelihood of success of the motion, given the nature of the error or errors that can be raised; and

(2) the effect that such a motion might have on the client's appellate rights, including whether the filing of such a motion will assist in preserving the defendant's right to raise on appeal the issues that might be raised in the motion for appropriate relief.

Guideline 9.3 Right to Appeal to the Appellate Division

(a) Counsel should inform the defendant of his or her right to appeal the judgment of the court to the appellate division and the action that must be taken to perfect an appeal.

(b) If the defendant has a right to appeal and wants to file an appeal, the attorney shall preserve the defendant's right to do so by entering notice of appeal in accordance with the procedures and timelines set forth in G.S. 15A-1448 and the Rules of Appellate Procedure. Pursuant to Rule 33(a) of the North Carolina Rules of Appellate Procedure and Rules 1.7(a) and 3.2(a) of the Rules of the Commission on Indigent Defense Services, the entry of notice of appeal does not constitute a general appearance as counsel of record in the appellate division.

(c) If the defendant does not have a right to appeal and counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of *certiorari*, counsel should inform the defendant of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure.

(d) If counsel believes the defendant has a right to appeal and continues to be indigent, but the trial court denies appointed appellate counsel or denies indigency status for purposes of appeal, trial counsel

should consult with the Office of the Appellate Defender about the defendant's options and inform the defendant of those options.

(e) Where the client takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court, and should timely respond to reasonable requests from appellate counsel for additional information about the case.

Guideline 9.4 Bail Pending Appeal

(a) Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist under G.S. 15A-536 to be released on bail pending the disposition of the appeal and, prior to the appointment of appellate counsel, make such a motion where appropriate.

(b) Where an appeal is taken and after appellate counsel is appointed, trial counsel should cooperate with appellate counsel in providing information if appellate counsel pursues a request for bail.

Guideline 9.5 Post-Disposition Obligations

Even after counsel's representation in a case is complete, counsel should comply with a client's reasonable requests for information and materials that are part of counsel's file. Counsel should also take reasonable steps to correct clerical or other errors in court documents, including jail credit calculations.

(Adopted November 12, 2004.)

Index to Rules for Indigent Defense Services

C

CAPITAL CASES.
Appellate counsel.
Outside compensation prohibited, IDS Rule 2B.3.
Provisional appointment of office of appellate defender, IDS Rule 2B.2.
Post conviction counsel.
Outside compensation prohibited, IDS Rule 2C.3.
Trial counsel.
Assignment of IDS office, IDS Rule 2A.2.

CAPITAL CASES —Cont'd
Trial counsel —Cont'd
Outside compensation prohibited, IDS Rule 2A.4.

N

NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES.
Appellate counsel.
Outside compensation prohibited, IDS Rule 3.3.
Provisional appointment of office of appellate defender, IDS Rule 3.2.

NORTH CAROLINA SUPREME COURT LIBRARY RULES

Adopted December 20, 1967,
with amendments received effective March 1, 2005.

General Provisions

Rule
2. Definitions.

Hours and Use of Library

3. Hours.

Rule
4. Use during regular hours.

Index follows Rules.

GENERAL PROVISIONS

Rule 2. Definitions.

Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(a) "Assistant Librarian" means the Assistant Librarian of the Supreme Court Library.

(a1) "User" means:

i. justice, judge, employee, or volunteer of the Appellate Division of the General Court of Justice;

ii. employee of the State of North Carolina in the discharge of official duties; and

iii. practicing attorney licensed in the State of North Carolina.

(a2) "Authorized visitor" means:

i. employee of a user possessing permission on standard form issued by a member of the Library staff to visit the facility; and

ii. person possessing permission on standard form issued by the Librarian to visit the facility.

(b) "Librarian" means the Librarian of the Supreme Court Library.

(c) "Library" means the North Carolina Supreme Court Library.

(d) "Library Committee" means that committee appointed and acting pursuant to G.S. 7A-13 of the General Statutes of North Carolina.

(e) "Library material" means any book, paper, document, map, magazine, pamphlet, newspaper, manuscript, film, periodical, or other item or material, regardless of physical form of characteristics, that is a part of the collection or holdings of the Library.

(f) "Official Register" means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

(g) "Rules" means any rules or regulations contained in the North Carolina Supreme Court Library Rules.

(h) "Staff" means any assistants or other persons or employees appointed by or working under the supervision of the Librarian of the Supreme Court Library. (Amended November 28, 1972; amended March 1, 2005.)

HOURS AND USE OF LIBRARY

Rule 3. Hours.

Except on State Holidays or when the Library Committee authorizes that it

closed, the Library shall be open to users and authorized visitors on Monday through Friday from eight-thirty o'clock in the morning until four-thirty o'clock in the afternoon. (Amended July 24, 1980; November 8, 1983, eff. January 1, 1984; amended March 1, 2004; amended March 1, 2005.)

Rule 4. Use during regular hours.

Any user or authorized visitor who acts in a quiet, orderly, and lawful manner and who abides by the Rules and the reasonable requests of the staff may visit the Library and reasonably use its material to such extent, in such manner, and for such duration as in the discretion of the Librarian reasonably does not or will not interfere with the performance of the Library's primary function of serving the Appellate Division of the General Court of Justice. (Amended March 1, 2005)

Index to North Carolina Supreme Court Library Rules

A

AUTHORIZED VISITOR.
Defined, Sup. Ct. Library Rule 2.

U

USER.
Defined, Sup. Ct. Library Rule 2.

WORKERS' COMPENSATION RULES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

ARTICLE V. AGREEMENTS

Rule 502. Compromise settlement agreements.

CASE NOTES

Finalizing Settlement Agreement. — Under the sequence of Workers' Comp. R. N.C. Indus. Comm'n art. X, R. 502(1) and N.C. Mediated Settlement & Neutral Evaluation Conferences, N.C. Indus. Comm'n R. 4(d), in the settlement of a workers' compensation claim against a county, the pre-audit certificate required under G.S. 159-28, certifying that a county has unencumbered funds with which to pay an obligation, will naturally be executed, if at all, after the settlement conference, when the amount of the county's liability is known, and as part of the general formalizing of the documents for submission to the North Carolina Industrial Commission, so an otherwise valid memorandum of agreement settling such a claim is not rendered void by the fact that it does not bear a pre-audit certificate, and an agreement to prepare a formalized settlement compromise agreement for the Industrial Commission's consideration does not require a pre-audit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement. Lee v. Wake County, — N.C. App. —, 598 S.E.2d 427, 2004 N.C. App. LEXIS 1148 (2004), cert. denied, 359 N.C. 190, — S.E.2d — (2004).

ARTICLE VI. CONTESTED CASES

Rule 613. Dismissals and removals.

CASE NOTES

Dismissal Without Notice Improper. — It was improper to dismiss a workers' compensation case unless the affected party was given notice and an opportunity to be heard; a deputy commissioner's sua sponte order dismissing an employee's claim without notice was improper and was reversed. Jackson v. Flambeau Airmold Corp., — N.C. App. —, 599 S.E.2d 919, 2004 N.C. App. LEXIS 1503 (2004).

RULES FOR MEDIATED SETTLEMENT AND NEUTRAL EVALUATION CONFERENCES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

Rule 4. Duties of parties, representatives, and attorneys.

CASE NOTES

County agent's authority to settle claim. — Second half of N.C. Mediated Settlement & Neutral Evaluation Conferences, N.C. Indus. Comm'n R. 4(a)(1)(D), standing alone, did not place a county worker settling a workers' compensation claim against the county on constructive notice of the possibility that the authority of a county agent settling the claim might be limited. Lee v. Wake County, — N.C. App. —, 598 S.E.2d 427, 2004 N.C. App. LEXIS 1148 (2004), cert. denied, 359 N.C. 190, — S.E.2d — (2004).

Finalizing Agreement. —

Under the sequence of Workers' Comp. R. N.C. Indus. Comm'n art. X, R. 502(1) and N.C. Mediated Settlement & Neutral Evaluation Conferences, N.C. Indus. Comm'n R. 4(d), in the settlement of a workers' compensation claim against a county, the pre-audit certificate required under G.S. 159-28, certifying that a county has unencumbered funds with which to pay an obligation, will naturally be executed, if at all, after the settlement conference, when the amount of the county's liability is known, and as part of the general formalizing of the documents for submission to the North Carolina Industrial Commission, so an otherwise valid memorandum of agreement settling such a claim is not rendered void by the fact that it does not bear a pre-audit certificate, and an agreement to prepare a formalized settlement compromise agreement for the Industrial Commission's consideration does not require a pre-audit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement. Lee v. Wake County, — N.C. App. —, 598 S.E.2d 427, 2004 N.C. App. LEXIS 1148 (2004), cert. denied, 359 N.C. 190, — S.E.2d — (2004).

LOCAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Revised effective October, 1992,
with amendments through February 5, 2005.

Index follows Rules.

Rule
36(b). Unpublished dispositions; Distribution of Opinions.
46(b). Admission to practice.

Rule 36(b). Unpublished dispositions; Distribution of Opinions.

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published opinions of the Court by paying an annual subscription fee for this service. In addition, copies of published opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. Copies of published and unpublished opinions are available from the Clerk's Office for $2.00 per opinion. Published and unpublished opinions issued since January 1, 1996 are available free of charge at www.ca4.uscourts.gov.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result. (Amended effective December 1, 1995; amended effective December 1, 2002; amended effective October 5, 2004; amended effective January 7, 2005.)

Rule 46(b). Admission to practice.

Only attorneys admitted to the bar of this Court may practice before the Court. An attorney may be named on a brief filed in this Court without being admitted to the bar of the Fourth Circuit, provided that at least one lawyer admitted to practice in this Court also appears on the brief. Any other document submitted by an attorney who is not a member of the bar of the Fourth Circuit will be accepted for filing conditioned on his or her qualifying for membership within a reasonable time.

Each applicant for admission to the bar of this Court shall file with the clerk an application on the form approved by the Court and furnished by the clerk. Thereafter, upon written or oral motion of a member of the bar of the Court, the Court will act upon the application. A qualified attorney may be admitted upon personal appearance in open court. It is not necessary that an applicant appear in open court for the purpose of being admitted unless the Court shall otherwise order.

The requisite $170 fee must accompany the application, but attorneys appointed by the Court to represent a party in forma pauperis, counsel for the United States and any agency thereof who has a case pending before this Court, and law clerks to the judges of the Court and to the district judges, magistrate judges, and bankruptcy judges within this Circuit shall be admitted to the bar of this Court without the payment of an admission fee. The clerk

shall credit $150 of each $170 fee to the Judiciary's fee account and designate the remaining $20 for deposit to a fund maintained by the Court for the benefit of the bench and bar in the administration of justice.

A certificate indicating that an attorney has been admitted to practice before the Fourth Circuit will be sent to counsel by mail after admission. (Amended effective December 1, 1995; amended effective September 30, 2003; amended effective February 15, 2005.)

Index to Local Rules of the United States Court of Appeals for the Fourth Circuit

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D

DOCKET.
Docketing statement.
Form, Fed. App. (4th Cir.) Form E.

F

FORMS.
Docketing statement, Fed. App. (4th Cir.) Form E.

LOCAL RULES OF CIVIL, CRIMINAL, AND BANKRUPTCY PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Revised effective January 17, 2001,
with amendments through November 1, 2004.

PART I. LOCAL RULES OF CIVIL PRACTICE

III. PLEADINGS AND MOTIONS

Rule LR7.3. Motion practice.

CASE NOTES

Failure to Respond. —
Even when a motion for summary judgment is unopposed, the court must still review the motion and determine whether the moving party is entitled to judgment as a matter of law; where plaintiff failed to respond to defendant's motion for summary judgment, the court proceeded to review the motion on its merits. Carter v. Gilbarco/Marconi, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 11863 (M.D.N.C. June 25, 2004).

Argument on Cited Case. — Pursuant to U.S. Dist. Ct., M.D.N.C., R. 7.3(i), an employee's motion to strike the city's and city officials' filing that argued a subsequent North Carolina Supreme Court decision that undermined the employee's position on a state law breach of contract claim was granted, but the court did not ignore the decision because it clarified a point of state law that was highly relevant to the employee's wrongful termination claim. Disher v. Weaver, 308 F. Supp. 2d 614, 2004 U.S. Dist. LEXIS 3849 (M.D.N.C. 2004).

Plaintiff's response to defendants' suggestion of subsequently decided authority exceeded the scope of U.S. Dist. Ct. M.D. N.C. R. 7.3(i) and therefore defendants' Fed. R. Civ. P. 12(f) motion to strike plaintiff's response was granted because Local Rule 7.3(i) did not allow a plaintiff to respond to defendants' suggestion of subsequently decided authority. Richmond v. Indalex Inc., 308 F. Supp. 2d 648, 2004 U.S. Dist. LEXIS 3851 (M.D.N.C. 2004).

Applied in Phillips v. Wood, 341 F. Supp. 2d 576, 2004 U.S. Dist. LEXIS 22894 (M.D.N.C. 2004).

IV. PARTIES

Rule LR17.1. Minors and incompetents as parties.

CASE NOTES

Applied in Aldridge v. Oxford Apparel, Inc., 348 F. Supp. 2d 574, 2004 U.S. Dist. LEXIS 25399 (M.D.N.C. 2004).

VII. JUDGMENT

Rule LR54.1. Taxation of costs.

CASE NOTES

Generally. — In litigation that resulted in two groups of plaintiffs, those who settled and those who did not settle, non-settling plaintiffs were not responsible for costs of depositions where it was uncertain whether those depositions were needed in defendants' case against non-settling plaintiffs. Luallen v. Guilford Health Care Ctr., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 11866 (M.D.N.C. June 25, 2004).

Request For Costs Premature Where Unsuccessful Party Files Timely Motion For New Trial. — Prevailing party's request for costs, although otherwise appropriately filed after the entry of judgment on a jury verdict, is premature under U.S. Dist. Ct., M.D. N.C., R. 54.1(a)(1)(ii) where the unsuccessful party files a timely motion for a new trial of judgment as a matter of law, since the time allowed for appeal does not begin to run until the motion is decided. Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC, 336 F. Supp. 2d 552, 2004 U.S. Dist. LEXIS 19181 (M.D.N.C. 2004).

Intermediate weekends and holidays should be excluded from the 10-day period of U.S. Dist. Ct., M.D. N.C., R. 54.1(b)(1) as provided in Fed. R. Civ. P. 6(a), but not from the three-day period provided in Rule 6(e). Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC, 336 F. Supp. 2d 552, 2004 U.S. Dist. LEXIS 19181 (M.D.N.C. 2004).

Rule LR54.2. Award of statutory attorney's fees.

CASE NOTES

Time Limitation. — Where the plaintiff filed a fee petition more than 60 days after the date the appellate court's opinion was issued, but fewer than 60 days after the issuance of the appellate court's mandate, there was no error in the denial of the defendant's request to strike the petition. Mercer v. Duke Univ., — F.3d —, 2005 U.S. App. LEXIS 3441 (4th Cir. Mar. 1, 2005).

Rule LR56.1. Summary judgment motions.

CASE NOTES

Where plaintiffs failed to respond to defendants' motion for summary judgment,

In an employee's national origin discrimination suit against the employer, where the employee failed to respond to the employer's summary judgment motion as required by U.S. Dist. Ct., M.D.N.C., R. 56.1(d), despite receiving a letter explaining the effect of the employee's failure to respond, the court treated the motion as uncontested. Sosa v. Advance Auto Parts, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 7798 (M.D.N.C. Apr. 30, 2004).

XI. LOCAL CIVIL RULES FOR WHICH THERE ARE NO CORRESPONDING FEDERAL RULES

Rule LR83.10e. Procedures for mediated settlement conferences.

CASE NOTES

Sanctions for Failure to Appear. — Where plaintiff failed to attend a scheduled mediation and blamed her attorney, the court declined to grant sanctions because it was not clear from the record why plaintiff missed the mediation. Carter v. Gilbarco/Marconi, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 11863 (M.D.N.C. June 25, 2004).

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

With amendments received through April 15, 2005.

Rule
1. Scope.
2. The Petition.
3. Filing the Petition; Inmate Filing.
4. Preliminary Review; Serving the Petition and Order.
5. The Answer and the Reply.
6. Discovery.
7. Expanding the Record.
8. Evidentiary hearing.
9. Second or Successive Petitions.
10. Powers of a Magistrate Judge.
11. Applicability of the Federal Rules of Civil Procedure.

Appendix of Forms

Index follows Rules.

Rule 1. Scope.

(a) *Cases Involving a Petition under 28 U.S.C.§ 2254.* These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state court judgment would violate the Constitution, laws, or treaties of the United States.

(b) *Other cases.* The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

Rule 2. The Petition.

(a) *Current Custody; Naming the Respondent.* If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.

(b) *Future Custody; Naming the Respondents and Specifying the Judgment.* If the petitioner is not yet in custody - but may be subject to future custody - under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.

(c) *Form.* The petition must:

(1) specify all the grounds for relief available to the petitioner;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.

(d) *Standard Form.* The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.

(e) *Separate Petitions for Judgments of Separate Courts.* A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

Rule 3. Filing the Petition; Inmate Filing.

(a) *Where to File; Copies; Filing Fee.* An original and two copies of the petition must be filed with the clerk and must be accompanied by:

(1) the applicable filing fee, or

(2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.

(b) *Filing.* The clerk must file the petition and enter it on the docket.

(c) *Time to File.* The time for filing a petition is governed by 28 U.S.C. § 2244(d).

(d) *Inmate Filing.* A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Rule 4. Preliminary Review; Serving the Petition and Order.

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Rule 5. The Answer and the Reply.

(a) *When Required.* The respondent is not required to answer the petition unless a judge so orders.

(b) *Contents: Addressing the Allegations; Stating a Bar.* The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(c) *Contents: Transcripts.* The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) *Contents: Briefs on Appeal and Opinions.* The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) *Reply.* The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery.

(a) *Leave of Court Required.* A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) *Requesting Discovery.* A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) *Deposition Expenses.* If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

Rule 7. Expanding the Record.

(a) *In General.* If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) *Types of Materials.* The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) *Review by the Opposing Party.* The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 8. Evidentiary hearing.

(a) *Determining Whether to Hold a Hearing.* If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

(b) *Reference to a Magistrate Judge.* A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) *Appointing Counsel; Time of Hearing.* If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

Rule 9. Second or Successive Petitions.

Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).

Rule 10. Powers of a Magistrate Judge.

A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636. (Amended effective August 1, 1979.)

Rule 11. Applicability of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

APPENDIX OF FORMS

(Amended effective December 1, 2004)

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No.:
Place of Confinement:	Prisoner No.:
Petitioner (include the name under which you were convicted) v.	Respondent (authorized person having custody of petitioner)
The Attorney General of the State of	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   _____

   _____

   (b) Criminal docket or case number (if you know): _____
2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____
3. Length of sentence: _____
4. In this case, were you convicted on more than one count or of more than one crime? Yes ❑ No ❑
5. Identify all crimes of which you were convicted and sentenced in this case: _____

   _____

   _____

   _____

   _____
6. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (3) Nolo contendere (no contest) ❑

   (2) Guilty ❑ (4) Insanity plea ❑

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?_____

_____

_____

_____

_____

_____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ❑ Judge only ❑

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ❑ No ❑

8. Did you appeal from the judgment of conviction?

Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

_____

_____

_____

_____

_____

(g) Did you seek further review by a higher state court? Yes ❑ No ❑

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

_____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

_____

_____

_____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(3) Third petition: Yes ❑ No ❑

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

_____

_____

_____

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

_____

_____

GROUND TWO: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

_____

_____

_____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

_____

_____

GROUND FOUR: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ❑ No ❑

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

_____

_____

_____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

_____

(b) At arraignment and plea: _____

_____

(c) At trial: _____

_____

(d) At sentencing: _____

_____

(e) On appeal: _____

_____

(f) In any post-conviction proceeding: _____

_____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

_____

_____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: _____

_____

_____

or any other relief to which petitioner may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

_____

_____

* * * * *

Index to Rules Governing Section 2254 Cases in the United States District Courts

A

APPOINTMENT OF COUNSEL, Rule 8.

D

DEPOSITION EXPENSES, Rule 6.

M

MAGISTRATE JUDGE.
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MAGISTRATE JUDGE —Cont'd
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P

PETITION.
Reply, Rule 5.
Second or successive petition, Rule 9.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

With amendments received through April 15, 2005.

Rule
1. Scope.
2. The Motion.
3. Filing the Motion; Inmate Filing.
4. Preliminary Review.
5. The Answer and the Reply.
6. Discovery.
7. Expanding the Record.
8. Evidentiary Hearing.
9. Second or Successive Motions.
10. Powers of a Magistrate Judge.
11. Time to Appeal.
12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Appendix of Forms

Index follows Rules.

Rule 1. Scope.

These rules govern a motion filed in a United States district court under 28 U.S.C. § 2255 by:

(a) a person in custody under a judgment of that court who seeks a determination that:

(1) the judgment violates the Constitution or laws of the United States;

(2) the court lacked jurisdiction to enter the judgment;

(3) the sentence exceeded the maximum allowed by law; or

(4) the judgment or sentence is otherwise subjectto collateral review; and

(b) a person in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court, who seeks a determination that:

(1) future custody under a judgment of the district court would violate the Constitution or laws of the United States;

(2) the district court lacked jurisdiction to enter the judgment;

(3) the district court's sentence exceeded the maximum allowed by law; or

(4) the district court's judgment or sentence is otherwise subject to collateral review.

Rule 2. The Motion.

(a) *Applying for Relief.* The application must be in the form of a motion to vacate, set aside, or correct the sentence.

(b) *Form.* The motion must:

(1) specify all the grounds for relief available to the moving party;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant.

(c) *Standard Form.* The motion must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to moving parties without charge.

(d) *Separate Motions for Separate Judgments.* A moving party who seeks relief from more than one judgment must file a separate motion covering each judgment.

Rule 3. Filing the Motion; Inmate Filing.

(a) *Where to File; Copies.* An original and two copies of the motion must be filed with the clerk.

(b) *Filing and service.* The clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered. The clerk must then deliver or serve a copy of the motion on the United States attorney in that district, together with a notice of its filing.

(c) *Time to File.* The time for filing a motion is governed by 28 U.S.C. § 2255 para. 6.

(d) *Inmate Filing.* A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Rule 4. Preliminary Review.

(a) *Referral to a Judge.* The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.

(b) *Initial Consideration by the Judge.* The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Rule 5. The Answer and the Reply.

(a) *When Required.* The respondent is not required to answer the motion unless a judge so orders.

(b) *Contents.* The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.

(c) *Records of Prior Proceedings.* If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.

(d) *Reply.* The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery.

(a) *Leave of Court Required.* A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) *Requesting Discovery.* A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) *Deposition Expenses.* If the government is granted leave to take a deposition, the judge may require the government to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

Rule 7. Expanding the Record.

(a) *In General.* If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.

(b) *Types of Materials.* The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.

(c) *Review by the Opposing Party.* The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 8. Evidentiary Hearing.

(a) *Determining Whether to Hold a Hearing.* If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

(b) *Reference to a Magistrate Judge.* A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed finding of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) *Appointing Counsel; Time of Hearing.* If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

(d) *Producing a Statement.* Federal Rule of Criminal Procedure 26.2(a)-(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.

Rule 9. Second or Successive Motions.

Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, as required by 28 U.S.C. § 2255, para. 8.

Rule 10. Powers of a Magistrate Judge.

A magistrate judge may perform the duties of a district judge under these rules, as authorized by 28 U.S.C. § 636.

Rule 11. Time to Appeal.

Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

APPENDIX OF FORMS

(Amended effective December 1, 2004.)

Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody

(Motion Under 28 U.S.C. § 2255)

Instructions

1. To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You are asking for relief from the conviction or the sentence. This form is your motion for relief.

2. You must file the form in the United States district court that entered the judgment that you are challenging. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.

7. In this motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this motion all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No.:
Place of Confinement:	Prisoner No.:
UNITED STATES OF AMERICA v.	Movant (include name under which convicted)

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   (b) Criminal docket or case number (if you know): _____
2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____
3. Length of sentence: _____
4. Nature of crime (all counts): _____
5. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (2) Guilty ❑ (3) Nolo contendere (no contest) ❑

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____
6. If you went to trial, what kind of trial did you have? (Check one) Jury ❑ Judge only ❑
7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ❑ No ❑

8. Did you appeal from the judgment of conviction? Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

_____

_____

_____

_____

_____

_____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND TWO: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND FOUR: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

_____

_____

_____

_____

_____

_____

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

_____

_____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ❑ No ❑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: _____

_____

_____

or any other relief to which movant may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

_____

_____

* * * * *

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